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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936 7

No. ~~40~~ 1

THE ATLANTIC REFINING COMPANY,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED APRIL 24, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 40

THE ATLANTIC REFINING COMPANY,
APPELLANT,

vs.

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APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

Record No. 1657

THE ATLANTIC REFINING COMPANY

versus

COMMONWEALTH OF VIRGINIA

Petition for Appeal from Order of State Corporation Commission

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To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Your petitioner, The Atlantic Refining Company, a corporation organized and existing under the laws of the State of Pennsylvania, respectfully represents that it is aggrieved by a final order entered by the State Corporation Commission on November 14, 1934, whereby said Commission denied and dismissed, with costs, petitioner's claim for a refund of the sum of Five Thousand Dollars ($5,000) previously paid by it, under protest, into the treasury of the State of Virginia as an alleged entrance fee required by Section 207 of the Tax Code of Virginia, 1928, the payment of which was made a condition precedent to its obtaining a certificate of authority to do business in this State.

Your petitioner is advised that it is entitled, as a matter of right, to have such order reviewed by this Honorable Court under and by virtue of the provisions of Section 3734 of the Code of Virginia, 1930, and respectfully asks that such a review be granted. There is filed herewith a copy of the record in the hearings before the State Corporation

[fol. 2] Commission, but this petition is not to be regarded as petitioner's opening brief, since such brief will be filed in due course.

Statement of Facts

The Atlantic Refining Company, hereafter sometimes called the "petitioner," is a foreign corporation organized and existing under the laws of the State of Pennsylvania, having procured its charter from said State on the 29th day of April, 1870. It is and has been for many years one of the major oil companies, selling gasoline and petroleum products in forty-seven States of the United States and in numerous foreign countries. At all times since its organization the petitioner has had its principal place of business in Philadelphia, Pennsylvania, where its executive, administrative, legal and accounting offices are maintained, and from which place all matters of substantial importance with respect to its business, including that done in Virginia, are directed.

On or about the 19th day of January, 1930, the petitioner applied to the State Corporation Commission for a certificate of authority to do business in Virginia, and duly presented to said Commission the written power of attorney required by Section 3847 of the Code of Virginia, 1919, as amended, the duly authenticated copies of its charter required by said section of the Code, and a certificate from the Comptroller of the Commonwealth of Virginia showing its payment into the treasury of Virginia of the entrance fee required by Section 207 of the Tax Code of Virginia, 1928, all of which was required of the petitioner before it was permitted to engage in business within the State of Virginia. Said entrance fee, in the amount of $5,000, was paid into the treasury under protest and duress, and in order to avoid the penalties prescribed, by Section 3848 of the Code of Virginia, 1919, as amended, which said statute provides, among other things, for the imposition of a fine of not less than $10 nor more than $1,000, for each business transaction within the State of a foreign corporation which has not obtained a certificate of authority, and further provides that no such corporation shall recover any money or property or enforce any contract in any court without first obtaining said certifi-

cate. On January 22, 1930, such a certificate of authority to transact business within the State of Virginia was duly issued and delivered to the petitioner, which has, since that date, been engaged continuously in the general business of distributing and selling gasoline and petroleum products in this State.

For some years prior to the 22nd day of January, 1930, [fol. 3] petitioner had transacted and carried on an interstate business in Virginia, but had not transacted or carried on any intrastate business within said State in its own name. (R., p. 170.) However, from about April 30, 1934, petitioner through the medium of subsidiary corporations had engaged continuously in intrastate business within Virginia. On said date petitioner purchased the entire capital stock of The Red "C" Oil Company, a Maryland corporation, then doing business in Virginia and other nearby States, and which, on August 3, 1922, had obtained a certificate of authority to do a general gasoline and petroleum products business in Virginia. At all times between April 30, 1934, and January 22, 1930, the date on which petitioner received its certificate of authority, The Red "C" Oil Company was engaged continuously in Virginia in the business of selling and marketing said products in both interstate and intrastate commerce, and throughout this period the petitioner owned the entire capital stock of The Red "C" Oil Company. On or about January 22, 1930, the petitioner acquired title to the entire properties and business of The Red "C" Oil Company in the State of Virginia, and about that date took charge of said properties and business, and subsequent thereto, under date of February 12, 1930, The Red "C" Oil Company surrendered its certificate of authority to do business in Virginia and withdrew from the State (R., p. 171).

From April 30, 1923, until January, 1929, The Red "C" Oil Company owned the entire capital stock of the Richmond Oil Company, a Virginia corporation, which was engaged principally in an intrastate business of selling gasoline and other petroleum products through a gasoline bulk station, and several gasoline service stations and tank wagons owned by it in Virginia. In January, 1929, said Richmond Oil Company discontinued active business in this State, and its property and assets, with the exception of its filling stations and its bulk station, were conveyed to The

Red "C" Oil Company, which assumed the liabilities of said Richmond Oil Company and took over its business, and thereafter and until on or about January 22, 1930, the business formerly conducted by it was conducted by The Red "C" Oil Company. Said bulk station is rented by the petitioner from the Richmond Oil Company, and all of the latter companies' capital stock is now owned by the petitioner as the transferee of the property and assets of the Red "C" Oil Company (R., p. 172).

On November 26, 1924, the Atlantic Refining and Asphalt Corporation, a New York corporation, all the capital stock of which was owned by the petitioner, received a certificate of authority to do business in Virginia, and from that date [fol. 4] until November 21, 1929, such corporation was engaged in the business of applying asphalt to roads within this State, and also in the business of selling and marketing gasoline and petroleum products in said State, both in intrastate and interstate commerce. The Atlantic Refining and Asphalt Corporation owned no property or facilities within Virginia necessary for the sale of gasoline and petroleum products in local trade, but it leased two storage terminals, one at Richmond and one at Norfolk, where such products purchased by it from the petitioner in interstate commerce were stored, and from which such products were sold and delivered mainly in intrastate commerce within Virginia, but partly in interstate commerce. In 1929 such corporation had, by proper charter amendment, changed its name to Atlantic Refining Company, Inc., and hence, on December 31, 1929, in order to enable the petitioner to qualify to do business in Virginia under its almost identical name, the Atlantic Refining Company, Inc., surrendered its certificate of authority and withdrew from the State of Virginia (R., pp. 172, 173).

From April 30, 1924, to January 22, 1930, the activities of petitioner in the State of Virginia were thus limited to: (1) its business through stock ownership of The Red "C" Oil Company, including the business done by the latter corporation's subsidiary, Richmond Oil Company; (2) its business through stock ownership of the Atlantic Refining Company, Inc.; and (3) an interstate business done by petitioner in its own name (R., pp. 78, 79).

From January, 1929, until October, 1929, the methods of shipment and sale of petitioner's products in Virginia were

as follows: Gasoline and petroleum products were sold by the petitioner to said Atlantic Refining Company, Inc., and delivered to that company's bulk terminals in Richmond or Norfolk. Said Atlantic Refining Company, Inc., then sold a substantial part of such products to The Red "C" Oil Company, making deliveries from said bulk terminals. The balance of such products were sold by said Atlantic Refining Company, Inc., to other oil companies, shipments being made to points within and without the State of Virginia. During this period, petitioner also sold in interstate commerce its gasoline and other petroleum products directly to The Red "C" Oil Company, and to other oil companies in Virginia, principally the National Oil Company, making such sales and deliveries in interstate commerce (R., pp. 79, 80).

Between October, 1929, and January 22, 1930, petitioner changed its method of making shipments into Virginia as follows: Petitioner sold its gasoline and petroleum products in interstate commerce to various oil companies doing [fol. 5] business in Virginia; principally to petitioner's subsidiary The Red "C" Oil Company, and to the National Oil Company, a part of such gasoline and petroleum products so sold being sold and shipped in interstate commerce, and delivered first to the terminals of the National Oil Company at Richmond, and from these terminals deliveries were made to The Red "C" Oil Company and other customers of petitioner, petitioner paying the National Oil Company a handling or rental charge for all such material not purchased and used by said National Oil Company. The remainder of petitioner's products sold in Virginia during this period was sold and delivered from time to time in interstate commerce directly to other customers, shipments being made by barge to such customers in Virginia (R., pp. 80, 81).

After January 22, 1930, until petitioner completed the construction of its own terminals at Richmond, Virginia, in March, 1930, it shipped gasoline and petroleum products to terminals of the National Oil Company at Richmond, and from these terminals made deliveries to its bulk and service stations, insofar as such products were required for petitioner's business in intrastate commerce, and at or from these terminals also delivered gasoline and other petroleum products purchased by National Oil Com-

pany and other customers in interstate commerce; also, petitioner made sales and deliveries from time to time in interstate commerce by barge to other customers, which shipments did not pass through the terminals above mentioned. In March, 1930, petitioner constructed in the City of Richmond new bulk terminals, and since that date all gasoline sold by petitioner in its local business in Virginia has been distributed from such terminals to its local bulk and service stations (R., pp. 81, 82).

Since January 22, 1930, on which date petitioner was licensed to do business in Virginia and about which time it took over the entire property and business of The Red "C" Oil Company in Virginia, the petitioner has continued to do an interstate and intrastate business in Virginia, substantially as the same was theretofore conducted by its subsidiary, The Red "C" Oil Company, enlarging to some extent the scope of said business, but conducting the same in substantially the same manner as The Red "C" Oil Company. The primary purpose of [redacted] petitioner in applying for a license to do business in Virginia was to take over in its own name the business theretofore conducted by The Red "C" Oil Company, and to enlarge said business, using substantially the same methods of conducting and managing it as said subsidiary had used (R., pp. 85, 176).

[fol. 6] The interstate and intrastate business of the petitioner, and its subsidiaries doing business in Virginia, at all times material to this case, has been conducted by the use of the same terminals, boats, barges, bulk and service stations, tank wagons and other facilities, and that at all times, with respect to accounting and administrative control and operation, there has been no segregation of expense between interstate and intrastate business, and, according to the testimony of witness Serven, auditor of the petitioner, segregation of expense between interstate and intrastate business was and is not practical, because the same facilities, officers, agents and employees were and are engaged in both intrastate and interstate business (R., pp. 83, 180). The Commission also found that the interstate and intrastate business being conducted in Virginia, by the several subsidiaries of the petitioner at the time the latter procured its certificate to do an intrastate business itself, was commingled and intermingled voluntarily by

the petitioner through its management, control and operation of such subsidiaries, and such commingling and intermingling of interstate and intrastate business was, as to such subsidiaries, prior to and as of the 22nd day of January, 1930, no greater nor more expensive than convenience, business policy, and the election of the management of such business dictated (R., pp. 180, 181).

The total number of shares of the capital stock of the petitioner authorized and which might be issued, as of January 22, 1930, was 4,000,000 shares, all of which was common stock of the par value of $25 per share, making a total authorized capitalization of $100,000,000. Of this capital, there was on said date, issued and outstanding only 2,681,980 shares, having a par value of $67,049,500. On or about said date, the total invested capital of the petitioner amounted to $132,196,275, and during the calendar year 1929 its total volume of business aggregated $153,520,041. Of such total invested capital, only $262,580 thereof was invested in Virginia on said date, which amount represented approximately one-fifth of one per cent of the total capital invested by petitioner. The volume of business done in said State during the calendar year 1929, including both interstate and intrastate business, amounted to $1,396,600, or *nine-tenths of one per cent of petitioner's* total business for that year. Approximately two-thirds of the business so done in Virginia was intrastate, and one-third thereof interstate (R., pp. 83, 84).

Under the provisions of the statutes above referred to, and particularly Section 207 of the Tax Code, 1928, said entrance fee of $5,000, which was assessed against and paid by the petitioner, was based upon petitioner's entire maxi-[fol. 7] mum authorized capital stock. Said entrance fee was not based upon the shares of stock that petitioner had actually issued, nor did said entrance fee so paid have any relation to the amount of capital employed or proposed to be employed by petitioner within the State of Virginia or elsewhere, nor did it have any relation to the value of the privilege or franchise to be exercised by petitioner within the State of Virginia, or to the amount of business proposed to be done or property owned or proposed to be acquired and used by petitioner in this State (R., pp. 169, 170).

The foregoing facts are not disputed, counsel for the Commonwealth having stated at the outset of the hearing

that only one point involved in the petition was subject to dispute (R., p. 72). This point relates to the claim that the intrastate business conducted by petitioner's subsidiaries, and which was taken over by petitioner on January 22, 1930, was indiscriminately intermingled with the interstate business of petitioner, and was not capable of practical separation. The Commission, refusing to accept the testimony of the witness Serven, as above set forth, with respect to the practicability of separating interstate and intrastate business, made a specific finding "that the interstate and intrastate business proposed to be conducted by petitioner after January 22, 1930, and therefore conducted by its subsidiaries and controlled corporations, were not so intermingled or commingled as to be incapable of practical separation or so as to make the interstate business necessarily dependent upon and inseparable from the intrastate business * * *." (R., p. 180). As will be argued in its brief to be subsequently filed, petitioner believes such finding is unwarranted.

Certain other facts, admittedly true, were introduced in evidence by the Commonwealth over petitioner's objection that such facts were wholly irrelevant and immaterial to the issues involved. This case was first presented to *to* the State Corporation Commission on July 15, 1932, at which time the parties concluded their evidence, and the matter was taken under advisement by the Commission (R., p. 101). More than a year later, on October 20, 1933, the case was reopened and a considerable volume of evidence, consisting chiefly of correspondence and records from the State Corporation Commission, was introduced over the objection of the petitioner. This additional evidence showed that in November of 1929 petitioner had made an attempt to procure a certificate of authority to do business in Virginia, and had actually tendered its check for $5,000 covering the entrance fee required by Section 207 of the Tax Code, 1928, without making any protest [fol. 8] against payment of said sum. However, such certificate was not granted at that time, and said check for $5,000 was returned to the petitioner, when it appeared that petitioner's subsidiary, Atlantic Refining Company, Inc., was qualified to do business in Virginia under a name too similar to petitioner's name for the latter to lawfully-qualify in this State.

At the same time, the Commonwealth produced further evidence, setting forth in great detail, certain charter powers of petitioner's subsidiaries which had qualified to do business in Virginia, and other matters pertaining to such subsidiaries which appeared in the files of the State Corporation Commission. Furthermore, similar detailed information was placed in the record with respect to the National Oil Company, which was not a subsidiary of the petitioner, but which, according to the Commission (R., p. 175) bore some mysterious and anomalous relation to the petitioner.

The foregoing statement does not purport to include, even in a summarized form, all of the evidence introduced, but it is believed that such statement does cover and include substantially all of the relevant facts, including those over which there is disagreement between petitioner and the Commonwealth as well as those admitted to be true.

This proceeding was instituted on the 20th day of April, 1930, under the provisions of Section 408 of the Tax Code, as amended, Acts 1930, p. 917, and in its petition filed on that date, the petitioner claimed the right to have said alleged entrance fee of $5,000, paid by it under protest and duress, refunded to it upon the ground that the statutes of Virginia above referred to, and under and by virtue of which said sum was collected, are unconstitutional and void, for the reasons set forth in said petition (R., pp. 8, 9), which reasons will sufficiently appear hereafter in the statement of petitioner's position.

Assignments of Error

Your petitioner respectfully assigns as error the following action by the Commission:

(1) The finding of fact by the Commission that the interstate and intrastate business proposed to be conducted by the petitioner after January 22, 1930, and theretofore conducted by its subsidiaries, was not so intermingled or commingled as to be incapable of practical separation or so as to make the interstate business necessarily dependent upon and inseparable from the intrastate business.

(2) The action of the Commission in admitting in evi- [fol. 9] dence, over petitioner's objection, the facts pertain-

ing to its unsuccessful attempt, in November, 1929, to procure a certificate of authority to do business in Virginia, including the fact that at such time petitioner tendered without protest its check for the $5,000 entrance fee, and particularly the conclusion of the Commission therefrom that petitioner had "admitted its liability" with respect to said entrance fee.

(3) The decision by the Commission that the petitioner has not been deprived of its property without due process of law, in violation of the provisions of the 14th Amendment of the Constitution of the United States, and of Section 11, Article I of the Constitution of the State of Virginia, by virtue of the imposition upon petitioner of said entrance fee under and pursuant to the provisions of Section 207 of the Tax Code of Virginia, 1928, and as required by Section 3847 of the Code of Virginia, 1919, as amended.

(4) The decision by the Commission that the enforcement of the aforesaid statutes did not constitute an interference with commerce among the several States, the right to regulate which is by Clause 3, Section 8, Article I of the Constitution of the United States conferred upon the Congress of the United States, and that the requiring of petitioner to pay said fee as a condition precedent to the doing of any intrastate business within this State did not constitute a burden upon interstate commerce in contravention of said Clause of the Constitution.

(5) The decision of the Commission that the enforcement of the aforesaid statutes did not deprive the petitioner of the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States.

(6) The action of the Commission in denying and dismissing petitioner's claim for a refund of said entrance fee.

Statement of Position

In view of petitioner's intent to file a brief in due course, wherein its position with respect to the foregoing assignment of error will be fully argued and the authorities discussed, no argument will be presented at this time. However, petitioner does desire herein to briefly outline its position:

1. Although the Commission's finding with respect to the practical severability of petitioner's interstate and intrastate activities in Virginia is by no means determinative of any one of the major legal questions involved, it is persuasive upon the issue of whether interstate commerce is [fol. 10] burdened and petitioner therefore objects to this finding because it is not supported by the evidence, and, indeed, is directly contrary to the undisputed testimony of the witness Serven.

2. The evidence introduced by the Commonwealth with respect to the unsuccessful attempt by petitioner to obtain a certificate of authority to do business in Virginia in November of 1929, at which time it tendered the required entrance fee without protest, is wholly immaterial and irrelevant to the issues involved in this case, and should have been excluded upon petitioner's objection. But even if such evidence is deemed properly admissible, the Commission's conclusion therefrom that petitioner had "admitted its liability" (R., p. 169) as to such entrance fee is wholly unwarranted and unjustified, both in fact and as a matter of law. This attempt by petitioner to qualify in November, 1929, was entirely separate and distinct from the subsequent qualification which is presently involved. As a matter of fact, the duly constituted authorities at the State Corporation Commission emphatically ruled that petitioner could not lawfully qualify at the time in question, so that at most such conduct was an incomplete and abortive attempt to make an "admission." But in any event it seems perfectly manifest that petitioner cannot be held to have waived its constitutional rights as to all times in the future simply because it evinced no intent to insist on such rights at a particular time in the past.

3. Since the taking of petitioner's property without due process of law, and the burdening of interstate commerce are, in this case, to some extent correlated (although not necessarily so), and are matters which are concurrently discussed by most of the pertinent Supreme Court decisions, petitioner's position with respect to assignments of error Nos. (3) and (4) may be united in one statement. Petitioner believes that the imposition of this so-called entrance fee placed a burden upon interstate commerce in contravention of the Commerce Clause of the Constitution of the United States and at the same time deprived petitioner of

its property without due process of law in violation of the Fourteenth Amendment to said Constitution, because said fee was measured by and predicated upon capital used in interstate commerce, and property located beyond the taxing power of the State. It is admitted that a State has the power to entirely exclude foreign corporations from the doing of an intrastate business, but limitations upon this power have been developed to such an extent by the process of judicial decision that said limitations are now of equal dignity with the power to exclude itself. In fact, it is today authoritatively settled that the States are entirely without power to use their lawful authority to ex- [fol. 11] clude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State, or, in the exercise of this power to exclude, to levy an imposition, in the form of a tax or otherwise, upon the property of such corporations and their activities outside of and beyond the jurisdiction of the State in question, in disregard of the commerce clause and the due process clause of the Fourteenth Amendment. Reference may be had to Looney v. Crane, 249 N. S. 178; Alpha Portland Cement Co. v. Mass., 268 U. S. 203; Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71; Western Union Tel. Co. v. Kansas, 216 U. S. 1; Pullman Co. v. Kansas, 216 U. S. 56; Ludwig v. Western Union Tel. Co., 216 U. S. 146, and International Text Book Co. v. Pigg, 217 U. S. 91, for some of the leading decisions wherein the foregoing principles were stated and applied. Petitioner is entirely aware that one of the questions involved in General Railway Signal Co. v. Virginia, 246 U. S. 500, was the validity of a fee imposed by what is now Section 207 of the Tax Code, and that the Supreme Court in that case, under the facts involved, sustained such imposition in a very brief opinion. In concluding such opinion, the Court was careful to say:

"It seems proper, however, to add that the case is on the border line."

Not only does petitioner feel that the factual situation in the present case clearly differentiates it from that which was involved in the General Railway Signal Company Case (bringing this case squarely within the doctrines of the decisions above mentioned), but also it is believed that such case in effect has been overruled by Cudahy Packing Company v. Hinkle, 278 U. S. 460.

5. The statutes in question operate to deprive petitioner of equal protection of the law in at least two respects: (a) The classification of foreign corporations in a different manner from domestic corporations doing identically the same character of business is discriminatory and arbitrary; and (b). The classification of foreign corporations according to their authorized capital stock and according to the scale of gradation prescribed by said Section 207, is discriminatory, arbitrary and unreasonable, and results in the taxing of petitioner in a different and more burdensome manner than the manner in which other foreign corporation are taxed for the same privileges within this State. Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71.

[fol. 12] Wherefore, it is respectfully prayed that an appeal and/or writ of error be granted in this case, and that this Honorable Court review and reverse the action of the State Corporation Commission, and that a final judgment may be entered directing the refund to the petitioner of said $5,000, with interest thereon at 6% per annum from the 19th day of January, 1930, and with its proper costs expended in these proceedings.

Copies of this petition were duly delivered to Abram P. Staples, Attorney General of the State of Virginia, and to Cassius M. Chichester, of counsel for the Commonwealth in this case, on the 8th day of May, 1935.

Respectfully submitted, The Atlantic Refining Company. Hunton, Williams, Anderson, Gay & Moore, Counsel. T. Justin Moore, Lewis F. Howell, Jr., of Counsel.

I, T. Justin Moore, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the rulings and judgment of the State Corporation Commission in the above case are erroneous, and that said judgment should be reviewed and reversed.

Given under my hand this 7th day of May, 1935.

T. Justin Moore.

Received May 8, 1935. M. B. Watts, Clerk.

Appeal awarded. Bond $1,000.00. May 17, 1935. Ed. W. Hudgins.

Received May 17, 1935. M. B. W.

[fol. 13] [Caption omitted.]

BEFORE STATE CORPORATION COMMISSION

In the Matter of the ATLANTIC REFINING COMPANY, a Foreign Corporation

PETITION FOR REFUND OF TAXES—Filed April 26, 1930

To the Honorable State Corporation Commission of Virginia:

The petitioner, The Atlantic Refining Company, respectfully represents:

Petitioner is a foreign corporation chartered under the laws of the State of Pennsylvania. A copy of the certificate of incorporation of the petitioner, which was filed in the Office of the Secretary of State of the State of Pennsylvania on the 29th day of April, 1870, together with all amendments thereof now in force, is filed with this petition, marked Exhibit "A" and made a part hereof.

On or about the 19th day of January, 1930, the petitioner presented to the State Corporation Commission of Virginia the written power of attorney required by Section 3847 of the Code of Virginia, the duly authenticated copy of the charter of the corporation required by said Section of the Code, together with certificate of the Comptroller of the Commonwealth of Virginia showing the payment into the treasury of Virginia of the entrance fee required under the provisions of Section 207 of the Tax Code of Virginia, 1928, which is substantially the same as Section 38-a of the Act entitled—

[fol. 14] "An Act to amend and re-enact sections 37, 38 and 39 of an act entitled an act to raise revenue for the support of the government and public free schools and to pay the interest on the public debt, and to provide a special tax for pensions, as authorized by section 189 of the Constitution, approved April 16, 1903, with reference to fees on charters of domestic corporations and fees on foreign corporations authorized to do business in this State, and to add a section thereto designated as section 38a,"

approved February 26, 1910, commonly known as the "Tax Bill", and all amendments thereto; which said payment

was required to be made by petitioner before it was permitted to carry on any business in the State of Virginia.

The above-mentioned entrance fee was fixed at the sum of $5,000 and the said amount was paid into the treasury of this State under protest and under duress and by virtue of the provisions of Section 3848 of the Code of Virginia, which last-mentioned statute, among other things, prohibits any foreign corporation from transacting any business in this State, without first obtaining a certificate of authority from the State Corporation Commission and provides that such corporation shall be fined not less than $10 nor more than $1,000, each business transaction in the State being deemed to be a separate offense, and further provides that no such corporation shall recover any money or property or enforce any contract in any court without first obtaining the certificate of authority to do business in this State provided for under the laws of this State.

Petitioner had previously in November, 1929, filed with said State Corporation Commission the written power of attorney required by Section 3847 of the Code of Virginia and the duly authenticated copy of the charter of the corporation, and had done all other things required by the laws of this State to be done, excepting only the payment of said entrance fee of $5,000, in order to obtain from said State Corporation Commission a certificate of authority to do business in this State, but said petitioner had objected and had protested against the payment of said entrance fee of $5,000, as unreasonable and arbitrary, and said Commission had refused to issue said certificate of authority without payment of said entrance fee in the amount above mentioned.

Petitioner gave notice to said Commission on January 7, 1930, of its intention to begin business in this State on or about January 15, 1930, without first paying said entrance [fol. 15] fee, agreeing, however, to do all such other acts and things as might be required by law in order to enable petitioner to qualify to do business in this State. Copy of the notice from petitioner to said Commission, in the form of a letter addressed to said Commission by petitioner, dated January 7, 1930, is herewith filed and made a part hereof marked Exhibit "B". Copy of the Commission's reply to said letter dated January 13, 1930, is herewith filed and made part hereof, marked Exhibit "C".

Acting under duress exercised by said Commission, and otherwise by virtue of the statutes above referred to, petitioner paid into the treasury of the State of Virginia on January 17, 1930, the said entrance fee in the sum of $5,000 required by said Commission to be paid by petitioner as a condition precedent to the issuance to petitioner of certificate of authority to do business in this State, this payment, however, being made under protest to the Honorable E. R. Combs, Comptroller of the Commonwealth of Virginia. Copy of said protest is herewith filed and made a part hereof as Exhibit "D".

Petitioner also files herewith copy of its protest to the State Corporation Commission of Virginia dated January 17, 1930, which was filed by petitioner with said Commission at the time its final application was made for certificate of authority to do business in this State, this protest being marked Exhibit "E".

On January 22, 1930, certificate of authority to transact business in the State of Virginia was duly issued and delivered to the said petitioner, petitioner having previously paid to the State Corporation Commission for costs incurred in connection with the recordation of the charter the sum of $25.50, which, together with said sum of $5,000, was required to be made before the said certificate of authority was issued and before petitioner was permitted to do any business or conduct any operations of any character in the State of Virginia. Petitioner has, continuously since the 22nd day of January, 1930, been engaged in the general business of distributing and selling gasoline and petroleum products in the State of Virginia.

The total number of shares of the capital stock of the petitioner authorized and which might be issued, as of January 22, 1930, was four million shares, all of which was common stock of the par value of $25 per share,—namely, a total authorized capitalization of $100,000,000. Of this capital there was on said date issued and outstanding only 2,681,980 shares, having a par value of $67,049,500.

Under Section 207 of the Tax Code of Virginia, 1928, which was in force on the date petitioner was qualified as a [fol. 16] foreign corporation to do business in this State, which Section is substantially the same as Section 38a of the Act approved February 26, 1910, commonly known as the "Tax Bill" hereinabove referred to, it was provided

that every foreign corporation, in order to obtain from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as therein set out, it being provided that for a corporation whose capital stock is over $90,000,000 the entrance fee shall be $5,000, and it being further provided in said Act as follows:

"For the purposes of this Section, the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

By virtue of Section 210 of the Tax Code of Virginia, 1928, which was in force at the time petitioner was authorized to do business in the State, which Section is substantially the same as Section 41 of the Tax Bill of Virginia hereinbefore referred to, it was provided that any foreign corporation authorized to do business in this State, whose maximum capital stock exceeds $300,000, shall pay an annual registration fee of $25, which shall be irrespective of any special license tax or other tax or fee imposed by law upon such corporation for the privilege of carrying on its business in this State or upon its franchise, property or receipts, it being further provided by this Section that failure for two successive years to pay such annual registration fee, when such failure continues for ninety days after the expiration of said two years, operates without further proceedings as a revocation of the corporation's certificate of authority to do business in this State.

Under the provisions of the statutes above referred to, the entrance fee which was assessed against petitioner in this case and paid by it was based upon the entire maximum authorized capital stock of petitioner. Said entrance fee was not based upon the shares of stock that petitioner had actually issued, nor did said entrance fee so paid have any relation to the amount of capital employed or proposed to be employed by petitioner within the State of Virginia or elsewhere, nor did it have any relation to the value of the privilege or franchise to be exercised by petitioner within the State of Virginia, or to the amount of business proposed to be done or property owned or proposed to be acquired and used by petitioner in this State.

[fol. 17] Petitioner, continuously since on or about August 3, 1922, until January 22, 1930, through ownership of the entire outstanding stock of The Red C Oil Company, a corporation chartered under the laws of the State of Maryland, and which was duly qualified on August 3, 1922, to do business in the State of Virginia, has been indirectly engaged in doing a general business of distributing and selling gasoline and petroleum products in the State of Virginia. Said The Red C Oil Company during this entire period has been engaged in intrastate and interstate business in the State of Virginia. As of January 22, 1930, The Red C Oil Company's property in the State of Virginia consisted mainly of bulk and service gasoline stations, having an approximate value of $260,800,—about one-third of its business being interstate and the remaining two-thirds being intrastate. The authorized capital stock of said corporation was $100,000,000, divided into 2,500 shares of preferred stock of the par value of $100 per share, and 37,500 shares of common stock of the par value of $20 per share—$455,500 par value of said stock being issued and outstanding on January 22, 1930. Said The Red C Oil Company at the time it obtained certificate of authority to do business in the State of Virginia, acting pursuant to the requirements of Section 38a of the Tax Bill of Virginia above described, which was then substantially the same statute as it is at the present time, paid into the treasury of this State the sum of $600 as an entrance fee.

Petitioner further represents that its primary purpose in seeking to obtain a certificate of authority to do business in the State of Virginia was to take over in its own name and right the property owned by its said subsidiary, The Red C Oil Company, and to conduct the business previously carried on by its said subsidiary, conducting the same for convenience and for the sake of simplicity in its own name rather than through its subsidiary. Accordingly, on or about the 22nd day of January, 1930, the date on which the certificate of authority was issued to petitioner to do business in this State, as aforesaid, petitioner acquired title to the entire properties and business of said The Red C Oil Company in the State of Virginia, and about that date took charge of said business in its own name. Petitioner has also acquired certain other property in its own name, so that petitioner now owns property in the State of Virginia

having a fair value of approximately $438,800. Said The Red C Oil Company accordingly formally withdrew from the State of Virginia, on February 12, 1930, with the consent of the State Corporation Commission.

[fol. 18] Petitioner was, on the 22nd day of January, 1930, and is now a corporation engaged in interstate commerce between and among the several States of the United States, being duly registered as a foreign corporation in fourteen States. The activities of the petitioner of a purely intrastate character within the State of Virginia consist mainly in the acquisition and holding of certain real estate for gasoline station purposes and in the distribution and sale of such gasoline and petroleum products as may be sold in purely local trade, all of which local trade in this State, however, is indiscriminately intermingled with the interstate business of petitioner, and is only a very small fractional part (less than one percentum) of the total business of petitioner throughout the United States and foreign countries.

Petitioner avers and charges that the statutes of the State of Virginia above referred to, by virtue of which petitioner was required to pay the said entrance fee of $5,000, are unconstitutional and void, for the following, among other, reasons:

(1) The Act, Section 207 of the Tax Code of Virginia, under which said entrance fee is imposed in effect has deprived petitioner of its property without due process of law, in violation of the provisions of the 14th Amendment of the Constitution of the United States, and of Section 2, Article I of the Constitution of the State of Virginia.

(2) The enforcement of the aforesaid statutes, as applied in this case, denies petitioner the equal protection of law in violation of the 14th Amendment of the Constitution of the United States.

(3) The enforcement of the aforesaid statutes constitutes an interference with commerce among the several States, the right to regulate which is by Clause 3, Section 8, Article I of the Constitution of the United States conferred upon the Congress of the United States, and, payment of said fee being required as a condition precedent to permitting petitioner to do any business in the State of Virginia, constitutes a burden upon interstate commerce.

(4) Said entrance fee is based on the total authorized capital stock of petitioner, without any reference to the amount of stock issued and outstanding, or the actual or market value of said stock, or of the location in the State of Virginia and elsewhere of the property of petitioner, or to the amount of business of petitioner in the State of Virginia or elsewhere, and without reference to any reasonable or logical basis, said amount being wholly arbitrary, excessive and unreasonable and oppressive.

[fols. 19-53] (5) Petitioner further represents that the Legislature of Virginia on the 25th day of March, 1930, passed an Act entitled:

"An Act to amend and re-enact Section 408 of Chapter 45 of the Acts of 1928, entitled 'An Act to revise, simplify, arrange and consolidate into one act the general tax and revenue statutes of the Commonwealth, which act shall constitute, and be designated and cited as 'The Tax Code of Virginia', approved February 21, 1928.' "

which Act was passed for the express purpose of conferring on this Commission jurisdiction to consider and determine the legality and validity of the assessment of the entrance fee required to be paid by petitioner in this case and to consider and determine, among other things, similar cases in which other foreign corporations doing business in this State may be interested, and fully empowering said Commission to require the refund of any such taxes, if the Commission decides that such tax or taxes have been illegally collected from any such foreign corporation.

Wherefore, your petitioner prays that this Honorable Body may certify to the Comptroller of the State of Virginia that petitioner has paid into the State treasury an amount in excess of that required by law, to-wit: $5,000 on account of the entrance fee paid by the petitioner upon the granting of the certificate of authority to do business in the State of Virginia, and that the amount so paid may be refunded to petitioner, and that it may have all such other relief as to which it may be entitled.

The Atlantic Refining Company, by Counsel. J. Barton Rettew, John H. Stone. T. Justin Moore, p. q.

Duly sworn to by R. D. Leonard. Jurat omitted in printing.

[fol. 54] EXHIBIT "B" TO PETITION

Copy

January 7, 1930.

Honorable State Corporation Commission, Richmond, Virginia.

Attention Mr. C. M. Chichester, Counsel

DEAR SIRS:

The undersigned, The Atlantic Refining Company, a [fol. 55] Pennsylvania corporation, having an authorized capital stock of $100,000,000 has recently acquired certain real estate in the State of Virginia, and also owns the entire capital stock of the Red C Oil Company, a foreign corporation engaged in the distribution and sale of gasoline and oil products in the State of Virginia.

The Atlantic Refining Company desires to take over and conduct in its own name the business in the State of Virginia heretofore conducted by the Red C Oil Company and to cause the property of that company to be transferred to it, withdrawing the Red C Oil Company from the State of Virginia. However, in connection with obtaining authority from the State of Virginia to do business in this State, the corporation is met with the requirements of Section 207 of the Tax Code which, if valid and applied to this company, will require the payment of an entrance fee of $5,000, although such payment would be without reference to the amount of stock issued or outstanding or the actual or market value of said stock, or to the location in the State of Virginia or elsewhere of property of the corporation, or to the amount of business of the corporation, said amount being fixed arbitrarily at the sum above specified.

The Atlantic Refining Company is advised that, under the recent decisions of the Supreme Court of the United States, the imposition of such an entrance fee under Section 207 of the Tax Code of Virginia is illegal and unconstitutional. If the corporation were permitted to pay said entrance fee, voluntarily but under protest, without in any way affecting its right to test the validity of said tax, it would greatly prefer so to handle the matter of entrance fee before beginning business in the State of Virginia. Counsel for this

Commission has contended, in a recent case now pending before this Commission, that the statutes of Virginia do not provide any remedy for the recovery of such payment if the same is voluntarily made under protest. We are advised that there is doubt as to whether any such remedy is provided under the statutes of Virginia, and consequently there appears to be no course open to us except to begin business without the payment of said entrance fee. Desiring that this Commission be fully advised as to our intentions, we beg to notify the Commission that The Atlantic Refining Company intends to acquire the property of the Red C Oil Company and to begin business in its own name on or about January 15, 1930, without first paying the entrance fee above mentioned.

If this Commission will suggest some method whereby [fol. 56] the entrance fee above referred to may be paid under protest without prejudice to the right of the corporation to recover the same back, if it be held that the Act under which the fee is imposed is invalid, we will be governed accordingly.

Very truly yours, The Atlantic Refining Company,
by T. Justin Moore, Its Attorney.

EXHIBIT "C" TO PETITION

Copy

Commonwealth of Virginia

State Corporation Commission

Richmond

January 13, 1930.

Atlantic Refining Company, Electric Building, Richmond, Virginia.

Attention T. Justin Moore, Attorney

GENTLEMEN:

Your letter of January 7, 1930, addressed to the State Corporation Commission, attention C. M. Chichester, Counsel, is before the Commission for attention.

It is noted that it is proposed to commence to do intrastate business in Virginia, in addition to the interstate busi-

ness already being conducted by you, without obtaining a license therefor by compliance with the provisions of Section 3847 Code of 1919, as amended, and paying the fee required by Section 207 of the Tax Code referred to and made a part of the provisions of Section 3847, on the ground that the entrance fee provided for is claimed to be illegal and unconstitutional.

In view of the fact that the laws referred to, at least in their substance, have been before the Supreme Court of Appeals of Virginia on frequent occasions and before the Supreme Court of the United States in a number of cases, at least one of which involved the direct issue of the constitutionality of the Virginia law, the Commission is constrained to take the position, until the contrary has been [fols. 57-64] distinctly held, that the laws referred to are constitutional and that your proposed course will constitute a violation of the law and subject you to the consequences provided by Section 3848 Code of 1919, as amended.

This is to notify you, therefore, that upon knowledge of the fact of your having carried on intrastate business without first having complied with the Virginia law and paid the requisite entrance fee, the Commission will at once institute proceedings under Section 3848 as it is in duty bound to do under the clear mandate of Section 3848 of the Code.

In reply to the last paragraph of your letter, the Commission does not feel that it is in a position to suggest any method by which you will proceed, and it goes no further than to inform you of its construction of the law with reference to the imperative duty resting upon it to proceed under Section 3848 when any infractions of the law come to its attention.

You will please understand that there is no purpose to prejudge the questions raised by you as far as you are concerned, and the primary object of this letter is to advise you of the course that will be pursued should you persist in your announced intention of commencing business without first having complied with the requirements of the Virginia law.

Yours very truly, State Corporation Commission of Virginia, by Wm. Meade Fletcher, Chairman.

AD.

[fol. 65] BEFORE STATE CORPORATION COMMISSION

Case No. 4199

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE ATLANTIC REFINING COMPANY, Ex Parte

ORDER FILING PETITION, ETC.—April 26, 1930

In the matter of petition for refund under Section 408 of Chapter 45, Acts 1928, as amended by Acts approved March 25, 1930.

This day came The Atlantic Refining Company, a corporation chartered under the laws of the State of Pennsylvania, by T. Justin Moore, its attorney, and presented its petition, and exhibits therewith, for a certification to the Comptroller for a refund under the provisions of Section 408 of Chapter 45 of the Acts of 1928, as amended by Acts approved March 25, 1930, and upon motion of The Atlantic Refining Company, by counsel;

[fol. 66] It is ordered, that the petition be, and it hereby is, filed, and that the matter be, and it hereby is, docketed, and that the matter be, and it hereby is, set for hearing at the courtroom of the State Corporation Commission, at Richmond, at 11 A. M., May 13, 1930;

It is Further Ordered, that an attested copy of this order together with an attested copy of the petition and all exhibits be served or sent by registered mail, return receipt requested, on or to the Attorney General of Virginia as and for the fifteen days' notice of the hearing herein set, and that an attested copy of this order as and for the fifteen days' notice be served or sent by registered mail, return receipt requested, to the petitioner.

(Several orders of continuance by consent of all parties are omitted, until the case was finally set for hearing on July 15, 1932.)

BEFORE STATE CORPORATION COMMISSION

At the Relation of the ATLANTIC REFINING COMPANY,
Ex Parte

Statement of Evidence

Present: Commissioner Peery, Chairman; Commissioner Fletcher; Commissioner Hooker.

APPEARANCES

Mr. Collins Denny, Jr., for the Commonwealth. Mr. T. Justin Moore, Mr. J. P. Rettew, Mr. Eppa Hunton, Jr., for the Petitioners.

July 15th, 1932.

STATEMENT AS TO SUBJECT OF DISCUSSION

By Mr. Denny: If the Commission please, Mr. Moore and I came very nearly reaching a stipulation in this case. The petition has a great many formal allegations in the case. Only one point in the petition which is the subject of discussion and which the Commonwealth is not ready to admit is found in the allegation on page 6 of the petition, reading as follows:

"The activities of the petition of a purely interstate character within the State of Virginia consist mainly in the acquisition and holding of certain real estate for gasoline [fol. 67] station purposes and for the distribution and sale of such gasoline and petroleum products as may be sold in purely local trade, all of which local trade in this State, however, is indiscriminately intermingled with the interstate business of petitioner, and is only a very small fractional part (less than one per cent) of the total business of petitioner throughout the United States and foreign countries."

It is on questions of this nature of intrastate business and the relation between intrastate business and interstate business that the Commonwealth desires evidence to be introduced in this case. So far as the formal allegations and stock statements contained in the petition, they are admitted.

By Mr. Moore: In fact, we understand all the allegations in the petition, except that one which the Commonwealth has not stipulated, are correct. With that understanding, we would like to call Mr. Serven to the stand.

LEON SERVEN, a witness introduced on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Moore:

Q. Mr. Serven, please state your name, residence and your occupation?

A. My name is Leon Serven, my residence is Edenheim, Montgomery County, Pennsylvania.

Q. Where is your place of business?

A. My place of business is the Atlantic Refining Company, 260 South Broad Street, Philadelphia, Pa.

Q. What is your position with the Atlantic Refining Company, the petitioner in this case?

A. Assistant Comptroller, in charge of domestic marketing and accounting.

Q. How long have you been connected with the Atlantic Refining Company?

A. For nineteen years.

Q. The Atlantic Refining Company is one of the larger oil companies selling gasoline and petroleum products all over the world, is it not?

A. One of the major companies.

Q. In the performance of your duties as Assistant Comptroller of this Company have you an intimate knowledge of the methods of conducting the gas business in Virginia?

[fol. 68] A. I have.

Q. Generally speaking, how is the management of the Company's business in Virginia conducted?

A. Conducted through its officers, executives and managers, and directed by those individuals from the home office in Philadelphia, the direction being decentralized through local managers and representatives.

Q. Is the Virginia business controlled directly from Philadelphia, or through some division office as an intermediary office?

A. Both ways; the main control is directed from Philadelphia, with certain portions of the activities being di-

rected from our local office in Baltimore, and in turn subdivided through our local office in the City of Richmond.

Q. At our request, have you prepared, for the sake of brevity, a statement summarizing the character of the business that was done by any subsidiaries of the Atlantic Refining Company prior to January 22, 1930, when that Company entered the State of Virginia, and by the Atlantic Refining Company since that date?

A. I have prepared such a statement.

Q. I now hand you this statement, a copy of which has been furnished the other side. The statement which I have just handed you is the statement to which you just referred, which you prepared?

A. This is the statement.

Q. Are the facts set forth in that statement true and correct to the best of your knowledge and belief?

A. They are.

Mr. Moore: The statement reads as follows:

Petitioner, The Atlantic Refining Company, was chartered and organized under the laws of the State of Pennsylvania on April 29, 1870, and has at all times since its organization had its principal office in the City of Philadelphia, Pennsylvania, where the executive, administrative, legal and accounting offices of petitioner are maintained and from which place all matters of substantial importance with respect to the business of petitioner and its subsidiaries are directed.

Petitioner has for many years been engaged in the business of refining and sale of gasoline and petroleum products, the marketing activities of itself and its subsidiaries extending into forty seven States in the United States and many foreign countries, and in fourteen of these forty seven States petitioner conducts local station and tank wagon business, including a large investment in refineries, [fol. 69] pipe lines, boats, barges, real estate, equipment and other marketing facilities.

For many year- prior to April 30, 1924, petitioner sold its gasoline and petroleum products in Virginia exclusively in interstate commerce to various oil companies doing business in this State, but petitioners initial interest in the ownership of any gasoline and petroleum business in the State of Virginia began on or about April 30, 1924, on which

date petitioner, in order to protect accounts receivable due to it by Red "C" Oil Company, a Maryland corporation then doing business in the State of Virginia and other nearby states, purchased the entire capital stock of said Red "C" Oil Company.

The said Red "C" Oil Company was engaged continuously in the State of Virginia in the business of selling gasoline and petroleum products, in interstate and in intrastate commerce, between April 30, 1924 and January 22, 1930, the date on which petitioner was licensed to do business in said State as set forth in said petition, and throughout this period petitioner owned the entire capital stock of said Red "C" Oil Company. Said Red "C" Oil Company also owned during the period from April 30, 1924, until January, 1929, the entire capital stock of Richmond Oil Company, a Virginia corporation, engaged principally in an intrastate business of selling gasoline and other petroleum products in local trade from gasoline service stations and tank wagons. In January, 1929, said Richmond Oil Company discontinued active business in Virginia, the activities of said Company having been taken over and continued in the name of the Red "C" Oil Company until about January 22, 1930, at which time the petitioner was licensed to do business in Virginia.

In November, 1924, Atlantic Refining and Asphalt Corporation, a New York corporation, and wholly owned subsidiary of petitioner, was licensed in Virginia, as a foreign corporation, to conduct the business of applying asphalt to roads and to do and interstate and intrastate gasoline and petroleum products business, and this subsidiary of petitioner was engaged in this business in Virginia from November, 1924, until November 21, 1929, on which last mentioned date registration was withdrawn. During this period the name of petitioner's said subsidiary, Atlantic Refining and Asphalt Corporation, was changed to the name Atlantic Refining Company, *Inc.*, continuing as a New York corporation. The said last mentioned corporation was engaged, during the period it was licensed to do business in [fol. 70] Virginia, mainly in the business of selling gasoline and petroleum products, but it had no property or facilities, such as service stations and tank wagons, necessary for the sale of such gasoline or petroleum products in local retail trade. Said corporation had two storage terminals, one at Richmond, Virginia, and one at Norfolk, Virginia,

which it rented the use of, for the storage of gasoline and petroleum products purchased by said corporation from petitioner in interstate commerce, and, from these terminals gasoline and petroleum products refined by petitioner were sold and delivered by said Atlantic Refining Company, *Inc.*, from time to time, mainly in intrastate but partly in interstate commerce.

From April 30, 1924 until January 22, 1930 the activities of petitioner in the State of Virginia were thus limited to: (1) its business through stock ownership of said Red "C" Oil Company, including the business done by the latter corporation's subsidiary Richmond Oil Company, (2) its business through stock ownership of said Atlantic Refining Company, Inc., the New York corporation, and (3) strictly interstate business done by petitioner in its own name.

As of January 1, 1930 the Red "C" Oil Company owned property in the State of Virginia having a book value of $262,580, consisting principally of forty three automobiles and trucks, ten bulk stations including land buildings and equipment, four local service stations including land, buildings, equipment, and certain pumps and other equipment loaned to local dealers handling petitioner's products. As of said date, Atlantic Refining Company, Inc., the New York corporation, owned no property in the State of Virginia, and neither did petitioner own any property in said State. Thus, as of January 1, 1930, the only business in which petitioner was interested in the State of Virginia was the business, interstate and intrastate, of the Red "C" Oil Company and the interstate business conducted by petitioner in its own name; and the only property in Virginia in which petitioner was interested was the above described property belonging to Red "C" Oil Company having a value of approximately $262,580.

From January, 1929, until October, 1929, the method of shipment and sale of petitioner's products in Virginia was as follows:

A part of petitioner's gasoline and petroleum products sold in Virginia by Red "C" Oil Company was sold in interstate commerce and shipped from Philadelphia to the above mentioned bulk terminals in Richmond or Norfolk, [fol. 71] Virginia, rented by Atlantic Refining Company, Inc., the New York corporation, this latter corporation purchasing said products from petitioner and in turn selling

said products to Red "C" Oil Company. The remainder of the gasoline and petroleum products sold by Red "C" Oil Company in Virginia, during this period, was shipped and delivered by petitioner directly to Red "C" Oil Company by rail from the City of Philadelphia in interstate commerce. From its terminals above described said Atlantic Refining Company, Inc., the New York corporation, also shipped gasoline and petroleum products to other oil companies, such shipments being made to points in the State of Virginia and also to points outside of the State of Virginia. During this period, petitioner also sold in interstate commerce its gasoline and other petroleum products directly to other oil companies in Virginia, principally the National Oil Company, making such sales and deliveries in interstate commerce.

Between October, 1929 and January 22, 1930, petitioner changed its method of making shipments into Virginia, as follows:

Petitioner sold its gasoline and petroleum products in interstate commerce to various oil companies doing business in Virginia, principally petitioner's subsidiary, Red "C" Oil Company, and National Oil Company, a part of such gasoline and petroleum products so sold being sold and shipped in interstate commerce and delivered first to the terminals of the National Oil Company at Richmond, Virginia, and from these terminals deliveries were made to Red "C" Oil Company and other customers of petitioner, petitioner paying the National Oil Company handling or so-called rental charge for all such material not purchased and used by National Oil Company. The remainder of petitioner's products sold in Virginia during this period was sold and delivered from time to time in interstate commerce to other customers, shipments being made by barge to such customers in Virginia.

After January 22, 1930, until petitioner completed the construction of its own terminals at Richmond, Virginia, in March, 1930, it shipped gasoline and petroleum products to the terminals of the National Oil Company at Richmond, and from these terminals made deliveries to its bulk and service stations, in so far as such products were required for petitioner's business in intrastate commerce, and at or from these terminals also delivered gasoline and other petroleum products purchased by National Oil Company

and other customers in interstate commerce; also petitioner made sales and deliveries from time to time in interstate [fol. 72] commerce by barge to other customers, which shipments did not pass through the terminals above mentioned.

In March, 1930, petitioner constructed in the City of Richmond new bulk terminals for itself and, since that date, all gasoline sold by petitioner in its local business in Virginia has been distributed from such terminals to its local bulk and service stations; also from or through said terminals certain quantities of gasoline sold in interstate commerce to other oil companies have been delivered; also certain gasoline and other petroleum products have been sold in interstate commerce and delivered in Virginia from Philadelphia to other customers not passing through said Richmond terminals.

All of the mentioned subsidiary companies of petitioner have continuously, during the periods above referred to while said companies were engaged in business in Virginia, done in interstate business in addition to their intrastate activities, said intrastate business being done through the medium of local service stations, tank wagons and tank cars from bulk terminals. Petitioner in its own name has continuously, since April, 1924 and up to the present, conducted an interstate business in Virginia, chiefly through the medium of barge shipments of gasoline and petroleum products from its refineries located outside of Virginia direct to customers in the State of Virginia, one of its larger customers in interstate business being the National Oil Company.

The interstate and intrastate business of petitioner and its subsidiaries doing business in Virginia has been at all time material hereto conducted by the use of the same terminals, boats, barges, bulk and service stations, tank wagons and other facilities. Further, at all times, with respect to accounting and administrative control and operation there has not been any segregation of expense between interstate and intrastate business, nor has such segregation been practical, because the same facilities, offices, officers, agents and employees have been engaged in interstate and intrastate business.

As of January 1, 1930 the total invested capital of petitioner amounted to $132,196,275, and it did a total volume of business during the year 1929 of $153,520,041; its capital invested in the State of Virginia as of January 1, 1930

amounting to $262,580, representing 1/5 of 1% of the total capital invested by petitioner. Petitioner's capital invested in Virginia on January 22, 1930, when it was licensed to do business in the State, was not materially different from January 1, 1930. The volume of business done in the State [fol. 73] of Virginia during the year 1929, both interstate and intrastate, amounted to $1,396,600, or 9/10 of 1% of petitioner's total business for that year. This business consisted of the following:

(1) Interstate business done by petitioner in its own name	$363,534
(2) Business done by Red "C" Oil Company, both interstate and intrastate, but principally intrastate	$866,600
(3) Business of Atlantic Refining Company, Inc., exclusively intrastate	166,466
Total	$1,396,600

Approximately two-thirds of the above total business was intrastate and one-third interstate.

As of June 30, 1931, the total invested capital of petitioner was $124,807,775, of which $741,966, or 6/10 of 1% was employed in the State of Virginia. This increase in petitioner's invested capital, as compared with January 1, 1930, has been the result of petitioner having enlarged its activities in the State immediately after it was licensed to do business in its own name on January 22, 1930; the character and volume of business, however, has not been substantially changed, but owing to reduction in prices total sales during the year 1930 declined to $1,245,136, which was less than 1% of the total volume of petitioner's business for this year amounting to $126,873,254.

Slightly in excess of one third of petitioner's total business in Virginia in 1930 was interstate.

From on or about January 22nd, 1930, on which date petitioner was licensed to do business in Virginia and about which time petitioner took over the entire properties and business of the Red "C" Oil Company in the State of Virginia petitioner has continued to do an interstate and intrastate business in the State of Virginia substantially as the same was theretofore conducted by its subsidiary said Red "C" Oil Company, enlarging to some extent the scope of

said business but conducting the same in substantially the same manner as said Red "C" Oil Company, and the primary purpose of petitioner in applying for a license to do business in Virginia being merely to take over in its own name the business theretofore conducted by its subsidiary and to enlarge said business, using the same method of conducting and managing said business as said subsidiary had used, said subsidiary having been continuously engaged [fol. 74] in the sale of gasoline and petroleum products refined by petitioner.

Cross-examination.

By Mr. Denny:

Q. Mr. Serven, how many local stations does your own company own in Virginia?

A. At the present time?

Q. First, give us the number at the time you domesticated here in Virginia?

A. It is stated in the stipulation 43 automobiles and trucks, 10 bulk stations and 4 local service stations.

Q. Where were those local service stations located?

A. At that time principally in the City of Richmond.

Q. How many of those local service stations have you got located in Virginia now?

A. Approximately twelve.

Q. You do entirely an intrastate business at your local filling stations, serving whomsoever may drive in your service stations?

A. Yes.

Q. I understand all your filling stations are supplied with gasoline from your bulk stations, which are located here in Richmond?

A. Not entirely.

Q. How are your local filling stations supplied with the material they are selling?

A. They are supplied with the material through many of the tank wagons delivering from the bulk stations, which bulk stations receive their material in part from their terminals in Norfolk and Richmond, some of it coming from the refineries in Philadelphia by tank cars.

Q. Are the bulk stations where your tank wagons are filled located here in Virginia?

A. They are.

Q. Going back a step further, give us, if you please, the source of supply of those bulk stations?

A. The source of supply is for gasoline from the distributing terminal located in Richmond, and for other products from refineries at Philadelphia, or from the distributing terminal at Baltimore, and from refineries at Brunswick, Georgia.

Q. In other words, your bulk stations here in Virginia are in part supplied with these materials by distributing [fol. 75] stations located here in Virginia and also by refineries or distributing stations located outside of Virginia?

A. Yes.

Q. Does gasoline come to your bulk station from sources both outside and within the State of Virginia, or does all your gasoline come from the distributing stations here in Richmond or Norfolk?

A. The main grades of the gasoline going to the bulk stations in Virginia are received from the Richmond terminal, which in turn received its supply from outside the State of Virginia. I am not certain with regard to the major grades of gasoline as to whether they come from the refineries at the bulk stations, or from the refineries outside the State of Virginia.

Q. But the large bulk comes from the distributing stations in Virginia?

A. Yes.

Q. In other words, the primary amount of gasoline ultimately sold to the consumer in Virginia is the shipments received from your refineries outside of the State of Virginia?

A. That is for one product only, gasoline.

Q. That gasoline is placed in your distributing stations here in Virginia, and part of it, I suppose, is shipped out of the State from those distributing stations to supply the territory in surrounding States?

A. Yes.

Q. The other part is shipped from the bulk stations in Virginia?

A. Not the entire part.

Q. A part of it, I mean?

A. I understood you to say the other part. I qualify that by saying not the whole part of the other part, but a part of the other part.

Q. Here from your distributing stations you made intrastate tank car shipments to persons in Virginia?

A. Yes.

Q. And you make shipments to your bulk stations in Virginia?

A. Correct.

Q. When your gas reaches the bulk stations does any of your gas from the bulk stations go out of the State?

A. It does.

Q. Explain how your bulk stations operate to haul gasoline to the various points of delivery outside of the State?

A. I can't recall for the moment the particular locations [fol. 76] in the State of Virginia from which those tank wagon deliveries are made out of the State, but the business relations are conducted by means of a contract for a year's delivery, or possibly three years' delivery, to be made at certain periods to customers outside of the State of Virginia by means of tank wagons.

Q. About what volume of business done by your bulk stations is interstate shipments?

A. I don't know.

Q. Only a very small proportion of your gas that goes into your bulk stations goes out of the State of Virgina in tank wagon sales?

A. Correct.

Q. The large proportion of the gas going into your Virginia bulk stations is in turn sold by those bulk stations directly to filling stations, or other customers, here in Virginia, or delivered to your own filling stations for sale to the retail trade?

A. That is correct.

Q. I suppose your filling stations, of course, sell oil?

A. Yes.

Q. How does your oil come in?

A. Directly from refineries outside the State of Virgina, by means of tank cars or packages to the bulk stations and to the main warehouses in Virginia.

Q. Do you own any warehouse here in the State?

A. We do.

Q. How many warehouses do you own?

A. I think approximately four or five warehouses; some large and some small.

Q. Are they located at one point or scattered over the State?

A. Scattered over the State, located at some of the stations where we have gasoline bulk stations.

Q. When your oil is shipped directly into your bulk stations, or into your warehouses, what becomes of it then?

A. It in turn is either delivered to our service stations for sale in retail business or delivered directly to a customer for resale in wholesale business, or, possibly, shipped to another State for resale there, or directly to a customer in another State, depending upon transportation or economy in freight.

Q. Is it true that a very small proportion of the oil that comes into your bulk stations goes out of Virginia?

A. Yes.

Q. In other words, the primary purpose in the handling [fol. 77] of gas and oil products in Virginia is to supply what we might call the local Virginia business?

A. That is correct.

Q. What shipments are made out of the State are made simply for convenience, because you have that supply here and a shorter haul?

A. That is, from particular local stations.

Q. You also, at your service stations, sell grease and matters of that kind?

A. Yes, we do.

Q. Explain where your supply comes from in the case of your articles other than gas and oil?

A. In exactly the same manner as the oil is received from refineries from supply points outside of the State of Virginia as the point of origin to warehouse and bulk and tank wagons in the State of Virginia, and in turn distributed from those bulk stations to service stations to be delivered to the consumer.

Q. Is it true of grease and other accessories, as of gas and oil, the interstate shipments from your bulk stations constitute but a very small portion of the shipments out of bulk stations and warehouses?

A. Yes.

Q. It is also true of grease and other accessories that they are brought here to your bulk stations and warehouses primarily for the Virginia trade?

A. Yes, that which is received at our stations.

Q. Do your warehouses do any business for other people

at all, or are they confined to the handling of products which you ship in here and which you sell here?

A. Solely confined to the products of the Atlantic Refining Company, with some exceptions which immediately arise, such as a product made by other than the Atlantic Refining Company, such as automobile accessories, tires and tubes, which the Atlantic Refining Company does not manufacture, but which it purchases in the State of Virginia, or out of the State of Virginia, for resale by itself in Virginia.

Q. Do you store in your warehouses any property belonging to other concerns, which other concerns in turn pay you a storage charge?

A. We do not.

Q. Mr. Serven, I suppose at each one of your twelve filling stations you have a man in charge of those filling stations?

A. That is correct.

Q. You, of course, keep certain books in connection with those filling stations, showing the amount of material which [fol. 78] you receive there and sales which you make, is that correct?

A. Essentially.

Q. How does he remit the proceeds of the sale?

A. If I may qualify the answer to the first question, he does not have any books of the value of the sales he makes. He does not know the value of the sales. He reports the quantity of business, quantity of materials that he sells, quantity of materials that he has received, and the amount of cash that he has taken in to the office located in Richmond, Virginia; the office in Richmond in turn remits that cash and reports of sales and receipts to its first superior office located in Baltimore; the Baltimore office in turn reporting to the office at Philadelphia.

Q. You then, have reporting here to the office in Richmond either daily or weekly whatever your period may be, the managers of your twelve filling stations?

A. That is correct.

Q. Showing the local sales made by them to the customers who drive into the filling stations?

A. Yes.

Q. Do your warehouses here in Virginia make their re-

ports and clear their records through your Richmond office?

A. In the same manner as do the filling stations.

Q. Do your bulk stations, I believe you call them, make their reports and clear their records through the Richmond office?

A. They are a part of the warehouse stations and report to the same managers.

Q. Do your distributing stations in Virginia report to the Richmond office?

A. Certain things they do, for purposes of stock control only; other purposes they report direct to Philadelphia.

Q. State that a little more fully, please?

A. Insofar as fixing the custom on deliveries made by tank to the Richmond terminal those accounts are rendered to the Baltimore office, and the account rendered to customers located in Virginia or out of Virginia to whom the material was delivered from the Richmond, Virginia, distributing station as Richmond deliveries, reports of those deliveries are rendered to the Richmond office for the purpose of stock control for delivery only.

Q. Would this be a fair summary of your method when your gasoline material comes into your distributing stations the primary accounts and records of your distributing stations are cleared through Philadelphia direct?

A. Yes.

[fol. 79] Q. That gas, in large part, moves either to your bulk stations here in Virginia, or goes out of the stations to points outside of the State of Virginia, or is a direct tank car shipment, either within or without Virginia, to a customer?

A. Yes.

Q. When you come to your bulk shipments and your warehouse shipments it is primarily engaged in supplying the Virginia trade?

A. Yes.

Q. And your service station trade, which is another unit, is solely engaged in what might be called Virginia trade?

A. Yes.

Q. From your statement manuscript, I understand that prior to the date of your acquisition of the Red C Oil Company your only business here in Virginia was purely interstate shipments into Virginia?

A. Of the Atlantic Refining Company, itself.

Q. After you acquired all the stock of the Red C Oil Company, which was a Maryland corporation, domesticated and doing business here in Virginia, all local business done in Virginia, in which you were incidentally interested by reason of your ownership of this stock, was done under the Red C Oil Company through The Atlantic Refining Company, Incorporated?

A. Or through a subsidiary of the Red C Oil Company, known as the Richmond Oil Company, in addition to which the Atlantic Refining Company made interstate sales to other customers than its associated and affiliated companies.

Q. They were purely interstate shipments from without the State of Virginia?

A. Yes.

Q. I notice from your statement you say the Richomnd Oil Company, which was a subsidiary of the Red C Oil Company discontinued active business in Virginia, how was its business and property handled?

A. The property of the Richmond Oil Company, except the filling stations in Virginia, was taken over by the Red C Oil Company. Its assets and liabilities were owned by the Red C Oil Company, and the properties turned over to the Red C Oil Company, with the exception of its filling stations in Virginia.

Q. What became of the bulk station here in Virginia?

A. Still the property of the Richmond Oil Company.

Q. Does that bulk station operate now?

A. It is rented to the Atlantic Refining Company.

[fol. 80] Q. The stock of the Richmond Oil Company is, of course, owned by The Atlantic Refining Company?

A. Yes.

Q. In November of 1924, your wholly owned subsidiary, The Atlantic Refining and Asphalt Corporation, which subsidiary became The Atlantic Refining Company, Incorporated, came here into Virginia; is it still operating in Virginia?

A. It is not; registration has been withdrawn.

Q. Did it own any property here in Virginia?

A. It did not, as stated in the stipulation.

Q. The business which it did when it withdrew was taken over, I believe, by the Red C Oil Company, and, in turn, has now come to The Atlantic Refining Company, or

what became of the business it did in Virginia when it withdrew?

A. There was a lapse of a few months between the withdrawal of the Atlantic Refining Company, Incorporated, and the registration of The Atlantic Refining Company in the State of Virginia, and during that lapse of time business was conducted by The Atlantic Refining Company in interstate commerce with the former tank car customers of The Atlantic Refining Company, Incorporated.

Q. Is the Red C Oil Company operating now at all?

A. They are not an operating company, but they are still in existence. I believe registration has been withdrawn in Virginia, but I am not certain.

Q. All of its properties were taken over by The Atlantic Refining Company, as I understand from your statement?

A. That is correct.

Q. You have your main Virginia offices here in Richmond, to which your filling stations and bulk stations and warehouses report?

A. And they look to them for direction of sales and operation.

Q. Do they get directions from the Richmond office?

A. Partly.

Q. How many people are employed in your Richmond office?

A. I cannot answer; I do not know.

Q. Can you give an estimate?

A. Possibly ten to twelve.

Q. Who is in charge of that office?

A. W. C. Liccerer.

Q. What is the position he occupies?

A. He is known as the District Manager for the Virginia territory.

[fol. 81] Q. Does The Atlantic Refining Company own its bulk stations and its warehouses and its distribution stations here in Virginia, or does it lease them?

A. It does, with the exception of possibly certain pieces of leased real estate it cannot purchase, but the buildings and equipment upon those leased grounds we own, and also we rent certain storage tanks from the National Oil Company.

Q. But the bulk of your properties here in Virginia are owned outright by The Atlantic Refining Company?

A. Yes, they are.

Q. You actually sell to the trade from your own twelve filling stations to local trade?

A. We do.

Q. Have you the number of local filling stations here in the State to which you supply your products by sales or otherwise, from which they are in turn sold to the ultimate consumer?

A. Not exactly, but they will run two hundred, or probably more.

Q. What is the arrangement between you and those stations under which they handle those products?

A. We own the tanks and the equipment, and they are loaned to the dealer. This dealer is not an employee of the Company. We own the tank and equipment. That is loaned to him, and there is a contract of sale for the marketing of the products of The Atlantic Refining Company, for a period running from one to five years.

Q. He buys direct from you and settles with you in cash or such credit terms as you see fit to give him?

A. Yes.

Q. Who absorbs the shrinkage of gas that comes from evaporation after delivery?

A. He purchases the material from us and takes title to it at the time the delivery is made to him.

Q. Any shrinkage there is his loss?

A. Yes.

(The witness stood aside.)

By Mr. Moore: That is the case.

By Commissioner Fletcher: Have you a stipulation?

By Mr. Denny: No, I said we are unable to agree on the stipulation.

By Mr. Moore: We stipulated in the beginning as to all [fol. 82] facts, except as to the one stated by Mr. Denny in the beginning.

By Commissioner: Do you think there are any facts in this case that would cause us to take a different view of the law.

By Mr. Moore: I am going to say that it seems to me that opinion covers fully everything on this subject.

By Commissioner: It rests with you whether you wish to file a brief.

By Mr. Moore: Suppose we consider the matter for a day or two.

By the Chairman: The Commission will take the matter under advisement.

BEFORE STATE CORPORATION COMMISSION

Case No. 4199

COMMONWEALTH OF VIRGINIA at the Relation of THE ATLANTIC REFINING COMPANY, ex Parte

ORDER REOPENING CASE—October 13, 1933

Upon joint motion of counsel, and in pursuance of agreement between counsel to such effect;

It is Ordered, That this matter, which is pending before the Commission for consideration as upon general continuance, be, and it hereby is, reopened and set for further hearing at the court room of the State Corporation Commission, State Office Building, Richmond, Virginia, at 10 A. M., October 19, 1933, at which time all additional evidence which may be desired to be placed in the record by or on behalf of the Commonwealth may be placed in the record, subject to the right of the Commission to permit additional evidence at a later date by and/or on behalf of the Commonwealth for good cause shown, and subject to the right of The Atlantic Refining Company to continuance to a latter date for purpose of putting in evidence in rebuttal should it be so desired;

It is Further Ordered, That attested copies hereof be sent to The Atlantic Refining Company, Attention T. Justin Moore, Attorney, and to the Attorney-General, Attention Collins Denny, Jr., Assistant Attorney-General.

[fols. 83-106] BEFORE STATE CORPORATION COMMISSION

Case No. 4199

COMMONWEALTH OF VIRGINIA at the Relation of THE ATLANTIC REFINING COMPANY, ex Parte

STIPULATION AS TO CERTAIN FACTS

It is agreed and stipulated by The Atlantic Refining Company and the Commonwealth of Virginia for purposes of the record in Case No. 4199, pending before the State Corporation Commission, and without admitting the relevancy of the fact or facts, or the admissibility of any evidence which might have been offered to establish the fact or facts, hereby stipulated, but, on the contrary, as far as The Atlantic Refining Company is concerned, express exceptions are made and noted to the relevancy of the fact or facts, and to the admissibility of any evidence in support of the fact or facts, hereby stipulated, that the business conducted by other large corporations engaged in the manufacture and distribution of petroleum products in the State of Virginia and throughout the country and foreign countries is not materially different in its general aspects, as to the character of business nor method of conducting same, from the business of The Atlantic Refining Company in Virginia, throughout the country, and in foreign countries, the purpose of this stipulation being to obviate the necessity of introducing witness or witnesses to establish the general character of business of, and method of carrying on business by, the large manufacturers and distributors of petroleum products engaged in business in Virginia and in the United States generally, or in other material portion of the United States and foreign countries, that is to say, engaged in both interstate and intrastate business in Virginia and in other portions of the country on a large scale comparable with The Atlantic Refining Company.

Given under our hands this 20 day of Oct., 1933.

Jno. R. Saunders, Attorney-General, by Collins Denny, Jr., Assistant Attorney General. The Atlantic Refining Company, by T. Justin Moore, Counsel.

[fol. 107] BEFORE STATE CORPORATION COMMISSION

Case No. 4199

COMMONWEALTH OF VIRGINIA at the Relation of THE ATLANTIC REFINING COMPANY, ex Parte

ORDER DENYING PETITION FOR REFUND—November 14, 1934

In the matter of petition for refund under Sections 408 of Chapter 45, Acts 1928, as amended by Chapter 423, Acts 1930.

This matter, which was instituted by order herein of April 26, 1930, was duly matured, and was fully heard on July 15, 1932, and on October 20, 1933, respectively, came on this day to be finally considered, by the full Commission as at this time constituted, Commissioner Ozlin having succeeded former Commissioner Peery, and having sat, by consent of counsel, in the hearing on October 20, 1933, upon the order herein of April 26, 1930, upon the petition of The Atlantic Refining Company, executed and verified on the 19th day of April, 1930, upon Exhibits "A", "B", "C", "D" and "E" filed with the petition, upon the evidence produced before the Commission on July 15, 1932, as same [fol. 108] appears in the transcript of the proceedings on that date before the Commission, upon the stipulation executed on October 20, 1934, by the petitioner, by T. Justin Moore, Counsel, and by the then Attorney General, by Collins Denny, Jr., then Assistant Attorney General, upon the evidence produced at the hearing on October 20, 1933, as same appear in the transcript of the proceedings before the Commission on October 20, 1933, upon the several exhibits filed therewith, upon the several orders of continuance, upon the entire record herein, and was argued by counsel;

Upon Consideration Whereof, the State Corporation Commission is of the opinion, for reasons stated by Fletcher, Commissioner, in a statement of facts and reasons, which is hereby filed and hereby made a part of the record in this matter, that the prayer of the petitioner for refund of an entrance fee in the amount of $5,000, paid under protest on January 17, 1930, should be denied, and that the petition herein should be dismissed, at the cost of the petitioner;

It is, Therefore, Ordered, that the petition, of The Atlantic Refining Company, for refund of entrance fee in the amount of $5,000, filed herein on April 28, 1930, under provisions of Section 408 of Chapter 45, Acts 1928, as amended by Chapter 423, Acts 1930, be, and it hereby is, denied, and that this proceeding be, and it hereby is, dismissed from the docket of the State Corporation Commission, at the cost of the petitioner, and that the papers be placed in the file for ended causes.

BEFORE STATE CORPORATION COMMISSION

Case No. 4199

COMMONWEALTH OF VIRGINIA at the Relation of THE ATLANTIC REFINING COMPANY, ex Parte

Statement of Facts and Reasons

By Fletcher, Commissioner:

The State Corporation Commission finds from the record in this matter, including testimony taken at the hearing [fol. 109] hereof, and from the records in the Clerks office of the State Corporation Commission, as introduced in evidence during this hearing, the following facts:

That the Atlantic Refining Company was incorporated under the laws of the State of Pennsylvania on the 29th day of April, 1870; that it was authorized by its charter and by amendment thereof, amongst other things, to carry on the business of "manufacture of illuminating and lubricating oils and all other products of petroleum, the manufacture of packages for holding the same, and all the business necessary and incident thereto"; that it is one of the major oil companies selling gasoline and petroleum products all over the world; that at all times since its organization in 1870 the petitioner has had its principal place of business in Philadelphia, Pa., w-ere its executive, administrative, legal and accounting offices are maintained and from which place all matters of substantial importance with respect to the petitioner and its subsidiaries are directed; that the main control of its business in Virginia is directed from Philadelphia, with certain portions of its activities being directed from an office in Baltimore, and in turn sub-

divided through an office in Richmond; that for many years it has been engaged in the business of refining and selling gasoline and petroleum products, the marketing activities of itself and its subsidiaries extending into forty-seven states of the United States and many foreign countries, and in fourteen of these forty-seven states it conducts local station and tank wagon business, and in such states has a large investment in refineries, pipe lines, boats, barges, real estate, equipment and other marketing facilities; that it obtained a certificate of authority to do business in Virginia, under Section 3847 of the Code of Virginia, 1919, as amended, on the 22nd day of January, 1930, and at the time of obtaining such certificate of authority, paid an entrance fee in the sum of $5,000—the maximum fee which can be charged under the Laws of Virginia—upon its maximum authorized capitalization, which then amounted to $100,000,000, under protest, the exact terms of which protest will be seen from Exhibit "F" filed with the petition;

That on the 28th day of April, 1930, under the provisions of Section 408 of the Tax Code, as amended, Acts 1930, p. 917, the petitioner instituted this proceeding by filing a petition for refund of said entrance fee, amounting to $5,000; that in and by said petition it was alleged that * [fol. 110] "on or about the 19th day of January, 1930, the petitioner presented to the State Corporation Commission a written power of attorney, required by Section 3847 of the Code of Virginia, the duly authenticated copy of its charter, required by said section, together with a certificate of the Comptroller of the Commonwealth of Virginia, showing the payment into the treasury of Virginia of the entrance fee required under the provisions of Section 207 of the Tax Code of Virginia, 1928, which was fixed at $5,000, and which was paid under protest and under duress and which said payment was required to be made by the petitioner before it was permitted to carry on *any* business in Virginia; that the petitioner had previously, in November, 1929, filed with the State Corporation Commission the written power of attorney required by said Section 3847 and the duly authenticated copy of its charter and had

* The following recitals, in quotation marks, are the substance of the material allegations of the petition, but all italics are added.

done all other things required by the laws of the State to be done, excepting only the payment of the entrance fee of $5,000, in order to obtain from the State Corporation Commission a certificate of authority to do business in Virginia, but that the petitioner had protested against the payment of said entrance fee of $5,000 as unreasonable and arbitrary, and said Commission had refused to issue said certificate of authority without payment of said entrance fee in the amount of $5,000; that the petitioner gave notice to the Commission on January 7, 1930, of its intention to begin business in Virginia on or about January 15, 1930, without first paying said entrance fee, agreeing, however, to do all such other acts and things as might be required by law in order to enable it to qualify to do business in Virginia; that, acting under duress exercised by the Commission, the petitioner paid into the treasury of Virginia said entrance fee required by the Commission to be paid as a condition precedent to the issuance of such certificate of authority to do business in Virginia, this payment, however, being made under protest; that on January 22, 1930, a certificate of authority to transact business in Virginia was issued to the petitioner, which had previously paid to the Commission for costs incurred in connection with the recordation of its charter the sum of $25.50, which together with said sum of $5,000, was required to be made before said certificate of authority was issued, and '*before petitioner was permitted to do any business or conduct any operations of any character in the State of Virginia*'; that petitioner had continuously since the 22nd day of January, 1930, been engaged in the *general* business of distributing [fol. 111] and selling gasoline and petroleum products in Virginia; that the total authorized capitalization of the petitioner as of January 22, 1930, was $100,000,000, of which capital there was on said date issued and outstanding shares having a par value of $67,049,500; that said entrance fee was based upon the entire maximum authorized capital stock of the petitioner and not upon its shares of stock actually issued and had no relation to the amount of capital employed, or proposed to be employed, by the petitioner in Virginia, or elsewhere, and had no relation to the value of the privilege or franchise to be exercised by the petitioner within the State of Virginia, or to the amount of business proposed to be done or property owned or pro-

posed to be acquired and used by the petitioner in Virginia; that the petitioner continuously since on or about August 3, 1922, through ownership of the entire outstanding stock of The Red "C" Oil Company, a Maryland corporation, which was duly qualified to do business in Virginia, had been indirectly engaged in doing a general business of distributing and selling gasoline and petroleum products in Virginia, and during this entire period said The Red "C" Oil Company had been engaged in *intrastate* and *interstate* business in Virginia; that as of January 22, 1930, The Red "C" Oil Company's property in Virginia consisted mainly of bulk and service gasoline stations, having an approximate value of $260,800—about one-third of its business being *interstate* and the remaining two-thirds being *intrastate;* that the authorized capital stock of said The Red "C" Oil Company was $1,000,000, $455,500 par value of said stock being issued and outstanding on January 22, 1930; that said The Red "C" Oil Company at the time it obtained a certificate of authority to do business in Virginia paid into the treasury of the State the sum of $600 as an entrance fee; that the *primary purpose* of the petitioner in seeking to obtain a certificate of authority to do business in Virginia was *to take over in its own name and right* the property owned by its said subsidiary, The Red "C" Oil Company, *and to conduct the business previously carried on by its said subsidiary,* conducting the same for convenience and for the sake of simplicity in its own name rather than through its subsidiary; that accordingly on or about January 22, 1930, the date on which petitioner so received its certificate of authority to do business in Virginia, the petitioner acquired title to the entire properties and business of said The Red "C" Oil Company in Virginia and about that date took charge of said business in its own [fol. 112] name; that petitioner had also acquired certain other property in the State of Virginia in its own name, so that the petitioner at the time of filing the petition owned property in Virginia having a fair value of approximately $438,800; that The Red "C" Oil Company formally withdrew from the State of Virginia on February 12, 1930, with the consent of the State Corporation Commission; that the petitioner was on the 22nd day of January, 1930, and was at the time of the filing of said petition, engaged in interstate commerce between and among the several

states of the United States, being duly registered as a foreign corporation in fourteen of such states; that the activities of the petitioner of *a purely intrastate character* within the State of Virginia at the time of the filing of the petition consisted mainly in the acquisition and holding of certain real estate for gasoline station purposes and *in the distribution and sale of such gasoline and petroleum products as might be sold in purely local trade,* all of which local trade in Virginia, however, was indiscriminately intermingled with the interstate business of the petitioner and was only a very small fractional part (less than one percentum) of the total business of the petitioner throughout the United States and foreign countries; that the statutes of Virginia requiring the payment of said entrance fee of $5,000 are unconstitutional and void for the following reasons: (1) The act under which said entrance fee was imposed deprived the petitioner of its property without due process of law, in violation of the Federal Constitution and the Constitution of the State of Virginia; (2) The enforcement of such statutes denied the petitioner the equal protection of law guaranteed by the Federal Constitution; (3) 'The enforcement of the said statutes' constituted an interference with commerce among the several states and 'payment of said fee being required as a condition precedent to permitting petitioner to do *Any* business in the State of Virginia constitutes a burden upon interstate commerce'; (4) That said entrance fee, being based on the total authorized capital stock, was arbitrary, excessive, unreasonable and oppressive";

That, notwithstanding the statements in said petition, it appears from the testimony of the petitioner's own witness and representative and from the correspondence between the petitioner and the Commission introduced in evidence on October 20, 1933, that said entrance fee of $5,000 was *not* demanded or required to be paid, nor was it paid, under protest, as a condition precedent to the doing of *any* business in Virginia, but such payment was demanded and required and such payment was made, under protest, as a [fol. 113] condition precedent to the right to transact *intrastate* business in Virginia, and it had no reference to, nor bearing upon, nor was it a condition precedent to the carrying on, or to the continued carrying on, of *interstate* busi-

ness by the petitioner, since the petitioner had, by its own admissions and the testimony of its own witness, been doing *interstate* business in Virginia for a period of six or more years; that it has been the uniform and well settled construction of Sections 3847 and 3848 of the Code of Virginia, and of other statutes in *pari materia*, that they refer to, and impose conditions upon the right to the conduct, in Virginia, of *intrastate*, as distinguished from *interstate*, business;

That on November 12, 1929, the petitioner made application to the State Corporation Commission for a certificate of authority to do business in Virginia, and with said application sent a certified check drawn to the order of the State Treasurer for $5,000 to pay the entrance fee required, and also a check for $6 to cover costs, and also two authenticated copies of its charter and the amendments thereto, and two powers of attorney (See letter of J. Barton Rettew, found in the record, transcript of proceedings on October 20, 1933, pages 10 and 11); that on November 14, 1929, the Clerk of the State Corporation Commission wrote to the petitioner calling its attention to the fact that a New York corporation by the name of Atlantic Refining Company, Inc., (which the evidence shows was a wholly owned subsidiary of the petitioner) had already been domesticated in Virginia and received a certificate of authority to do business therein, and that as long as such New York corporation held such certificate of authority the State Corporation Commission could not allow the domestication of the petitioner (See record, transcript of proceedings on October 20, 1933, pages 12 and 13); that on November 16, 1929, the petitioner wrote the State Corporation Commission, stating that it would cause the Atlantic Refining Company, Inc., the New York corporation, to withdraw from the State, and also stating that the petitioner was the parent corporation and the Atlantic Refining Company, Inc., was a subsidiary company, and asking that the certified check for $5,000, sent to the Commission on November 12, 1929, be returned and not paid into the State treasury until the petitioner could secure the withdrawal of the Atlantic Refining Company, Inc., from Virginia (See transcript of proceedings on October 20, 1933, pages 14 to 16); that on November 22, 1929, the State Corporation Commission, as requested, returned said check for $5,000 to the

[fol. 114] petitioner and advised the petitioner that in order to withdraw from Virginia the Atlantic Refining Company, Inc., would only have to return to the office of the State Corporation Commission the original certificate of authority to do business in Virginia issued to it, along with a letter stating that the corporation had ceased doing business in Virginia and desired to surrender the same (See transcript of proceedings on October 20, 1933, pages 16 to 18);

That from such correspondence it is seen that the entrance fee of $5,000 was placed in hand by the petitioner voluntarily and without protest, formal or informal, on November 12, 1929, and a certificate of authority to do business in Virginia was not issued at such time because of the wholly fortuitous circumstance that the name of the petitioner was preempted by its wholly owned subsidiary, Atlantic Refining Company, Inc., a New York corporation, and there were some details incident to the withdrawal of the latter from the State; and in the meantime the petitioner desired to have the $5,000 in its own hands rather than subject to deposit, albeit inadvertently, in the treasury of Virginia, *non constat*, petitioner might have changed its plans and elected to continue to conduct its intrastate business in Virginia through its subsidiaries, as had been done theretofore;

That the petitioner did not reconsider its decision to take over the intrastate business in Virginia of its subsidiaries, but secured the withdrawal of said Atlantic Refining Company, Inc., the New York corporation, from Virginia on December 31, 1929, and on January 22, 1930, the petitioner completed its domestication in Virginia and received a certificate of authority to do business in Virginia, but when the check for the $5,000 entrance fee was *again* placed in hand, it was done under a most formal protest, and after correspondence which was relied upon for the claim that petitioner was forced to pay such entrance fee under duress and threats (See correspondence consisting of a letter, dated January 7, 1930, from petitioner, by T. Justin Moore, its Attorney, to the State Corporation Commission, and the reply thereto from the Chairman of the State Corporation Commission, dated January 13, 1930, and the formal protest, dated January 17, 1930, with the Clerk's certificate of receipt of fees, etc., attached thereto, which will be found in the record as Exhibits "B", "C" and "F", respectively,

filed with the petition herein of the petitioner); that in said letter of January 13, 1930, it was stated that it was noted that the petitioner proposed to commence to do *intrastate* [fol. 115] business in Virginia, in addition to the *interstate* business already being conducted by it, without obtaining a certificate of authority, and that upon knowledge of the fact of the petitioner having carried on *intrastate* business without first having obtained such certificate of authority, proceedings would be instituted against the petitioner under Section 3848 of the Code of Virginia;

That it thus appears by indisputable documentary evidence, that the petitioner, in November, 1929, voluntarily and without protest placed in hand a check for said entrance fee of $5,000, and admitted its liability in that amount in order to accomplish its purpose of taking over and operating directly the *intrastate* business of its subsidiaries, and requested the return of the said check for $5,000 when an unforeseen obstacle to its immediate domestication in November, 1929, was discovered, and the check for $5,000 having been returned as requested, a very formal protest was made when the $5,000 was again placed in hand; that no change in law nor in fact occurred between November 12, 1929, when the entrance fee of $5,000 was first transmitted, and January 22, 1930, when it was again placed in hand, except that the obstacle as to name had been removed by the petitioner having secured the withdrawal of its subsidiary, Atlantic Refining Company, Inc., from Virginia;

That the effort on the part of the petitioner to obtain a certificate of authority to do business in Virginia upon payment of mere recordation fees was frustrated by the Commission and a certificate of authority to do business in Virginia was refused unless and until the entrance fee of $5,000 should have been paid;

That the entrance fee required of the petitioner in this case in the amount of $5,000 was the maximum amount which can be charged and the amount arrived at in view of the fact that the maximum authorized capital stock of the petitioner on the 22nd day of January, 1930, was $100,000,000, and that the demand of the payment of the maximum entrance fee of $5,000 and the subsequent assessment of the annual registration fee of $25.00 was in accordance with the administrative construction of the Tax Laws of Vir-

ginia, in connection with the issuance of certificates of authority to do business to foreign corporations and in the assessment of annual registration fees against foreign corporations, ever since the enactment of the law, substantially in its present form, in 1903, and the amendments thereto, and for the purposes of this case the same as the law in force on January 22, 1930, being Sections 207 and 210 of the present Tax Code of Virginia;

[fol. 116] That said entrance fee did not have any reference to or take any cognizance of the amount of paid-in capital of the petitioner nor the amount of capital employed, or proposed to be employed, by it within the State of Virginia, nor was there any attempt to evaluate the privilege or franchise which the petitioner was obtaining, and the failure to do so was in accordance with the uniform construction and administration of the applicable laws of Virginia throughout the entire period since the first enactment of the laws involved, substantially in their present terms, immediately after the adoption of the Constitution of 1902;

That prior to the 22nd day of January, 1930, the petitioner had not transacted or carried on any *intrastate* business in Virginia directly and/or in its own name, and that such business as it carried on in Virginia directly and/or in its own name, was confined strictly to *interstate business*, petitioner, having prior to January 22, 1930, elected to carry on its Virginia intrastate business through ownership and/or control of various subsidiary companies, and having through such ownership and/or control built up an extensive intrastate business in Virginia, and that its only intrastate business in Virginia was thus indirectly carried on—in other words, the petitioner was the beneficiary of the activities of various corporations, some foreign and some domestic, which it had organized or acquired, and, through stock ownership, managed and controlled;

That the petitioner's initial interest in the activities of any gasoline and petroleum business in Virginia began about April 30, 1924, on which date the petitioner purchased the entire capital stock of The Red "C" Oil Company, a Maryland corporation, then doing business in Virginia and other nearby states, and which, on August 3, 1922, had obtained a certificate of authority to do business in Virginia; that the corporate powers of The Red

"C" Oil Company were principally to manufacture, purchase and sell illuminating and lubricating oils; that between April 30, 1924, and January 22, 1930, the date on which petitioner received its certificate of authority to do business in Virginia, The Red "C" Oil Company was engaged continuously in Virginia in the business of selling gasoline and petroleum products in both interstate and intrastate commerce, and throughout this period the petitioner owned the entire capital stock of said The Red "C" Oil Company; that on or about January 22, 1930, after the petitioner received a certificate of authority to do business in Virginia, it acquired title to the entire properties and business of The Red "C" Oil Company in the State of [fol. 117] Virginia and about that date took charge of said business, and that under date of February 12, 1930, The Red "C" Oil Company surrendered its certificate of authority to do business in Virginia and withdrew from the State (See record, letters of February 5th, 6th and 13th, 1930, transcript of proceedings on October 20, 1933, pages 31-36);

That during the period from April 30, 1924, until January, 1929, The Red "C" Oil Company owned the entire capital stock of the Richmond Oil Company, a Virginia corporation, which was engaged principally in an *intrastate* business of selling gasoline and other petroleum products in a local trade through gasoline service stations and tank wagons owned by it and which owned a bulk station and some service or filling stations in Virginia; that in January, 1929, the Richmond Oil Company discontinued active business in Virginia and its property, with the exception of its filling stations and said bulk station, and all its other assets, were conveyed to The Red "C" Oil Company, which assumed the liabilities of the Richmond Oil Company and took over its business, and thereafter and until on or about January 22, 1930, the business formerly conducted by the Richmond Oil Company was conducted by The Red "C" Oil Company; that said bulk station is rented by the petitioner from the Richmond Oil Company and that all of its capital stock is owned by the petitioner as the transferee of the property and assets of The Red "C" Oil Company;

That on November 26, 1924, the Atlantic Refining & Asphalt Corporation, a New York corporation, and which was

also a wholly owned subsidiary of the petitioner, received a certificate of authority to do business in Virginia as a foreign corporation; that subsequently the name of such corporation was changed, by amendment, to Atlantic Refining Company, Inc., which, on July 18, 1929, received a certificate of authority to do business in Virginia under its amended name; that from November 26, 1924, until November 21, 1929, such corporation was engaged in the business of applying asphalt to roads in Virginia and did an interstate and *intrastate* gasoline and petroleum products business in Virginia, but had in Virginia no property of any kind or facilities, such as service stations and tank wagons, necessary for the sale of such gasoline or petroleum products in local retail trade, but it leased two storage terminals, one at Richmond, and one at Norfolk, which it used for the storage of gasoline and petroleum products purchased by it from the petitioner in interstate commerce, and from these terminals gasoline and petroleum products refined by petitioner [fol. 118] were sold and delivered by said New York corporation, from time to time, mainly in intrastate, but partly in interstate, commerce; that on December 31, 1929, in order to enable the petitioner to qualify to do business in Virginia as a foreign corporation, the Atlantic Refining Company, Inc., surrendered its certificate of authority and withdrew from the State of Virginia; that during the period between the withdrawal of the Atlantic Refining Company, Inc., a New York corporation, and the issuance of a certificate of authority to the petitioner, the business formerly conducted by the New York corporation was conducted by the petitioner in interstate commerce, with the former tank car customers of the New York corporation.

That from January, 1929, until October, 1929, a part of the petitioner's gasoline and petroleum products sold in Virginia by The Red "C" Oil Company were sold in interstate commerce and shipped from Philadelphia to the bulk stations in Richmond or Norfolk, rented by the Atlantic Refining Company, Inc., the New York corporation, the latter purchasing said products from the petitioner and in turn selling said products to The Red "C" Oil Company, and the remainder of the petitioner's gasoline and petroleum products sold in Virginia by The Red "C" Oil Company were shipped and delivered by the petitioner

directly to The Red "C" Oil Company from Philadelphia in interstate commerce; that the Atlantic Refining Company, Inc., the New York corporation, also shipped gasoline and petroleum products to other oil companies both within and without the State of Virginia from its two terminals at Richmond and Norfolk, and during this period the petitioner also sold in interstate commerce its gasoline and other petroleum products directly to other oil companies in Virginia, principally to the National Oil Company, a North Carolina corporation, licensed to do business in Virginia on April 19, 1904, and still apparently having authority to do business therein and carrying on in Virginia and elsewhere the business of buying and selling gasoline, petroleum, lubricating oils and products of petroleum and owning terminals in Richmond, Virginia; that between October, 1929, and January 22, 1930, the petitioner changed its method of making shipments into Virginia, selling its gasoline and petroleum products to various oil companies doing business in Virginia, principally its subsidiary, The Red "C" Oil Company and said National Oil Company, part of such products being sold and shipped in interstate commerce and delivered first to the terminals of the National Oil Company in Richmond and from these terminals deliveries were made to The Red "C" Oil Company and [fol. 119] other customers of the petitioner, the petitioner paying a handling, or so-called rental, charge for all such materials not purchased or used by said National Oil Company; that during said period the remainder of the petitioner's products sold in Virginia were sold and delivered by it from time to time in interstate commerce to other customers, shipments being made by barge to such customers in Virginia;

That the petitioner on January 22, 1930, when it secured a certificate of authority to do intrastate business in Virginia, (no certificate of authority being necessary to enable it to do an interstate business in Virginia) and took over the intrastate and interstate business in Virginia of The Red "C" Oil Company and began the transaction of intrastate business in Virginia, had no bulk terminals in Virginia, but in March, 1930, it completed the construction of its own terminals in Richmond; that after January 22, 1930, until March, 1930, when the petitioner completed the construction of its own terminals in Richmond, it shipped gasoline and

petroleum products to the terminals of the National Oil Company in Richmond as it had done prior to January 22, 1930, and from these terminals made deliveries to the petitioner's local bulk and service stations so acquired from The Red "C" Oil Company on January 22, 1930, insofar as such products were required for petitioner's business in intrastate commerce, and also at and from such terminals delivered gasoline and other petroleum products purchased by National Oil Company and other customers in interstate commerce; that it thus appears from the evidence that there was a relation between the National Oil Company and the petitioner other than that of a mere shipper of petroleum products and customer;

That since the completion of its terminals at Richmond in March, 1930, all gasoline sold by the petitioner in its local business in Virginia has been distributed from such terminals to its local bulk and service stations, and that through such terminals gasoline has been sold and delivered in interstate commerce to other oil companies; and certain gasoline and other petroleum products have been sold in interstate commerce and delivered in Virginia from Philadelphia to other customers without passing through the Richmond terminals; and that the gasoline coming to said terminals is shipped to them from out of Virginia in interstate commerce;

That all the subsidiary companies of the petitioner did continuously during the period referred to, while they were engaged in business in Virginia, an interstate business; in addition to their intrastate business, said intrastate busi- [fol. 120] ness being done through the medium of local service stations, tank wagons and tank cars from bulk terminals, and that petitioner, in its own name, has continuously since April, 1924, and up to the present time, conducted an interstate business in Virginia, chiefly through the medium of barge shipments of gasoline and petroleum products, from its refineries located outside of Virginia, direct to customers in Virginia; and the business of the petitioner in Virginia at the time it secured such cerificate of authority consisted, as previously stated, solely of interstate business to the entire exclusion of any legally transacted intrastate business, at least directly or in the name of the petitioner;

That from on or about January 22, 1930, on which date the petitioner was licensed to do business in Virginia, and

about which time it took over the entire property and business of The Red "C" Oil Company in Virginia, the petitioner has continued to do an interstate and intrastate business in Virginia, substantially as the same was theretofore conducted by its subsidiary, The Red "C" Oil Company, enlarging to some extent the scope of said business, but conducting the same in substantially the same manner as said The Red "C" Oil Company; and that the primary purpose of the petitioner in applying for a license to do business in Virginia was merely to take over in its own name the business theretofore conducted by its said subsidiary and to enlarge said business, using the same method of conducting and enlarging such business as said subsidiary used, said subsidiary having been continuously engaged in the sale and manufacture of petroleum products refined by the petitioner;

That, at the time the petitioner took over the property and business of The Red "C" Oil Company, such company had property in the State of Virginia having a book value of approximately $262,580.00, and consisting principally of forty-three automobiles and trucks, ten bulk stations, including land and buildings and equipment, four local service stations, including land, buildings and equipment, and certain pumps and other equipment loaned to local dealers handling the products of the petitioner; that prior to the acquisition by the petitioner of said property and business of The Red "C" Oil Company an entirely intrastate business was done by The Red "C" Oil Company at said local filling stations, which served whomsoever might drive into such stations;

That upon the taking over of the property and business of The Red "C" Oil Company, the petitioner undertook, and [fol. 121] has since continued, to do at said local filling stations the same business as that conducted by The Red "C" Oil Company, which business was a purely intrastate business, but at the time of the hearing on July 15, 1932, it had increased the number of such local service stations to twelve; that at such filling stations gasoline, oil, petroleum products and grease, produced by the petitioner, and, in addition, products made by others than the petitioner, such as automobile accessories, tires and tubes, etc., which the petitioner does not manufacture but which it purchases in Virginia and out of Virginia for re-sale by itself in Virginia,

are sold at retail to purchasers in Virginia; and that such local service stations are supplied with gasoline, petroleum products and other materials sold by them by tank wagons delivering from bulk stations and warehouses of the petitioner located in Virginia;

That the oil handled by the petitioner is shipped from refineries outside of the State of Virginia by means of tank cars or packages directly to the bulk stations and to the main warehouses, from which it is delivered to the local filling or service stations of the petitioner for sale in retail business, or delivered directly to a customer for resale in wholesale business, and a small portion is shipped from Virginia to a customer in another state, dependent upon transportation or economy in freight; that greases are handled in the same manner as oil, and that some accessories, such as tires, tubes, etc., not manufactured by the petitioner are purchased either in or out of the State of Virginia for re-sale by the petitioner in Virginia at such filling or service stations and are distributed from the warehouses, as are oils and greases;

That the petitioner had at the time of the hearing on July 15, 1932, its main office in Richmond, Virginia, to which its filling stations and bulk stations looked for the direction of sales and operations, and which was in charge of a man known as District Manager for the Virginia territory, and at which about ten or twelve persons were employed and had in Virginia approximately four or five warehouses whose business was confined solely to the handling of products of the petitioner, with some exceptions which might immediately arise, such as a product made by other than the petitioner, consisting of automobile accessories, tires and tubes, which the petitioner did not manufacture but which it purchased in Virginia or out of Virginia for re-sale by itself in Virginia, the petitioner not storing in its warehouses any property belonging to other concerns; that at such time the petitioner had in Virginia a number of local bulk stations which supplied the twelve local service [fol. 122] or filling stations with gasoline and petroleum products by means of tank wagons; that such bulk stations received their supplies in part from the terminals of the petitioner in Richmond and in part from refineries and distributing terminals located out of Virginia; that the petitioner also had distributing stations in Virginia which sup-

plied the large bulk of the gasoline and petroleum products shipped to the bulk stations but which made intrastate tank car shipments of gasoline to persons in Virginia and also made shipments of gasoline out of Virginia, but only a small proportion of the gasoline that went to the bulk stations went out of Virginia in tank wagon sales, the large proportion of the gasoline going to such bulk stations being in turn sold to filling stations or other customers in Virginia or delivered to the petitioner's own filling stations in Virginia for sale to the retail trade; that the primary purpose of the terminals and bulk stations in Virginia is to supply the local Virginia business and such shipments as may be made out of the State are simply made for convenience;

That at each of the filling stations books are kept showing the quantity of materials received and sold and the amount of cash that has been taken in, and the manager in charge of such station, at certain intervals, reports to the office located in Richmond such quantity of materials sold and received and the business done thereat and the amount of cash taken in and forwards such cash to the main office located in Richmond, which office in turn remits such report and cash to the Baltimore office, which in turn forwards the same to the office at Philadelphia; that the bulk stations and the warehouses make similar reports and the distributing stations report directly to the Philadelphia office;

That at the time of the hearing on July 15, 1932, the petitioner supplied its product to two hundred or probably more filling stations in Virginia not owned by it under an arrangement between the petitioner and the operator of such filling station, who is not an employee of the petitioner, by which certain tanks and equipment owned by the petitioner are loaned to the operator, who enters into a contract of sale for the marketing of the products of the petitioner for a specified period, such operator buying directly from the petitioner and settling with it in cash or on such credit terms as may be agreed upon, and such operator pu-chasing the material received at such station from the petitioner and taking title to it from the time the delivery is made to him;

That the petitioner owns outright all of its bulk stations, [fol. 123] its warehouses and its distribution stations in Vir-

ginia, with the exception of possibly certain leased real estate which it cannot purchase, but the buildings and equipment upon these leased grounds are owned by the petitioner and it also rents certain storage tanks from the National Oil Company;

That, according to the testimony of the witness Serven, who is the auditor of the petitioner, the interstate and intrastate business of the petitioner, and its subsidiaries doing business in Virginia, has been at all times material hereto conducted by the use of the same terminals, boats, barges, bulk and service stations, tank wagons and other facilities, and that at all times with respect to accounting and administrative control and operation there has not been any segregation of expense between interstate and intrastate business, and said witness stated that any such segregation was not practical, because the same facilities, officers, agents and employees were engaged in intrastate and interstate business;

That the business conducted in Virginia at the time of the entrance of the petitioner into the state to do intrastate business, on the part of the several subsidiaries which operated theretofore in Virginia, and insofar as such business consisted of both interstate and intrastate business, was commingled and intermingled voluntarily by the petitioner through its management, control and indirect operation of such subsidiaries, or by the independent companies which had from time to time been acquired and had been constituted subsidiaries of the petitioner; and that such commingling and intermingling of interstate and intrastate business was, as to such subsidiaries, prior to and as of the 22nd day of January, 1930, no greater nor more extensive than convenience, business policy and the election of the operator or operators of such business dictated;

That such commingling and intermingling of interstate and intrastate business in Virginia under the direction, control and dictation of the petitioner prior to January 22, 1930, and taken over by it and conducted directly thereafter, was to no greater extent nor greater involvement than the exigencies of the conduct of the busines of distribution, by wholesale and/or retail, of petroleum products throughout the country, as well as in Virginia, in the manner adopted and pursued, naturally entailed;

That the evidence wholly fails to establish the contrary and the Commission specifically finds that the interstate and intrastate business proposed to be conducted by the petitioner after January 22, 1930, and theretofore conducted by its subsidiaries and controlled corporations, were not so [fol. 124] intermingled or commingled as to be incapable of practical separation or so as to make the interstate business necessarily dependent upon and inseparable from the intrastate business, and that the petitioner is not authorized, and under Section 163 of the Constitution could not be authorized, to carry on, in Virginia, the public service business of the transportation, through pipe lines or otherwise, of petroleum products, and that the business proposed to be carried on by it in Virginia, and prior to January 22, 1930, carried on by its subsidiaries and controlled corporations, consisted solely of the *private* business of distribution of, and otherwise handling and dealing in, petroleum products in, to, and from the State of Virginia, or the conduct of an ordinary private business for profit, both interstate and intrastate;

That the business conducted by other large corporations engaged in the manufacture and distribution of petroleum products in the State of Virginia and throughout the country, and foreign countries, is not materially different, in its general aspects as to the character of business nor method of conducting the same, from the business of the Atlantic Refining Company in Virginia throughout the country, and in foreign countries (See stipulation dated October 20, 1933);

That the commingling and intermingling of the interstate and intrastate business of the petitioner, whether conducted directly or indirectly through subsidiaries, and during the period from 1924 to 1930, was, for all practical purposes, as complete, extensive and inseparable as would be the case as to the business, interstate and intrastate, proposed to be conducted when the petitioner decided to take over all subsidiary business, both interstate and intrastate, and to conduct the same directly and to such end applied for a certificate of authority to do business in Virginia, which certificate was obtained on the 22nd day of January, 1930 (See statement of Witness Serven, page 13, typewritten transcript of testimony taken on July 15, 1932);

That the only difference between the petitioner when it entered the State of Virginia on January 22, 1930, and its wholly owned and controlled subsidiary, Atlantic Refining & Asphalt Corporation, when it entered the State on November 6, 1924, is that the petitioner was taking over an intrastate business which it had already built up indirectly through its subsidiaries, and the Atlantic Refining & Asphalt Corporation had to build up its intrastate business from nothing, and this it did, together with interstate business;

That according to the testimony of Witness Serven, the [fol. 125] comptroller of the petitioner, the capital invested by the petitioner in Virginia upon its taking over, on or about January 22, 1930, the property and assets of The Red "C" Oil Company, valued at $262,800.00, was one-fifth of one per cent of the total invested capital of the petitioner, and that as of June 30, 1931, six-tenths of one per cent of the total invested capital of the petitioner was invested in Virginia, such increase of the petitioner's capital invested in Virginia being the result of its having enlarged its activities in Virginia after its domestication; that the volume of business done in Virginia during the year 1929 by the petitioner and its subsidiaries, both interstate and intrastate, amounted to $1,396,600.00, or nine-tenths of one per cent of its total business for that year; that approximately two-thirds of the total business done in the State by the petitioner and its subsidiaries during the year 1929 was intrastate, and one-third thereof interstate, and that the character and volume of the business done in Virginia by the petitioner during the year 1930 did not materially change from that done by the petitioner and its subsidiaries during the year 1929, its business done in Virginia being less than one per cent of its total business and slightly in excess of one-third of its total business done in Virginia in 1930 being interstate;

That the Commission has no means of determining the accuracy of the figures so given in the statement of Witness Serven as to the relative amounts of interstate and intrastate business, but such figures are accepted and found as approximately stating the facts; that the interstate and intrastate business of the petitioner, done directly and indirectly, prior to January 22, 1930, and such two kinds of business carried on by petitioner directly since that date

are severable for all practical purposes, and as a matter of fact have been severed by the witness, and representative of the petitioner, in his statement filed as a part of his testimony and his cross examination (See particularly pages 13 and 14 of transcript of testimony), but, however, the Commission does not hereby imply that the practical severability of interstate and intrastate business of an enterprise such as that conducted by the petitioner is material to the issues of this case;

That the entrance fee imposed and in question is not, according to the terms of the statute, to be measured, nor in its nature can it be measured by the intrastate business being done, since the hypothesis necessarily is that, at the time of entrance into the State, no intrastate business is being legally conducted, and such entrance fee is not imposed, as is alleged, on the interstate business being done or which [fol. 126] will be done, nor is it imposed on the privilege of doing interstate business, and this is manifestly by the fact, from the petitioner's own evidence, that *interstate* business was being conducted directly and in the name of the petitioner, as well as indirectly through its subsidiaries, prior to January 22, 1930, and its right to conduct such business had never been challenged, and no attempt had ever been made to force the petitioner to obtain a certificate of authority under Section 3847 of the Code, nor had any claim been asserted that the petitioner was subject to any charge or fee of any kind for the privilege of conducting its interstate business in Virginia, and that no charge had ever been imposed, or attempted to be imposed, upon the right on the part of the petitioner's subsidiaries, insofar as they were foreign corporations, to carry on interstate business in Virginia, nor had the indirect transaction of intrastate business by the petitioner, through its subsidiaries, been challenged officially or otherwise;

That, as a matter of fact, the fee or charge upon a foreign corporation for the privilege of doing an intrastate business, in conjunction with an interstate business, is no more a burden upon interstate business, because by general practice and the exigencies of such business there is practical intermingling and commingling of the two kinds of business, than would the imposition of a privilege tax upon a domestic corporation be a burden upon interstate commerce because such domestic corporation was carrying on both

interstate and intrastate business in the usual and customary manner involving intermingling and commingling of interstate and intrastate business;

Various other facts as to which there is no dispute, most of which are, in the view of the Commissioner, of little, if any, materiality, will be found in the petition, exhibits and transcript of testimony, and are not herein repeated and made the subject of specific findings of fact.

Upon the foregoing facts, and other material facts, in so far as they appear in the record, and for the reasons stated at large by the Commission in a case involving the same question, amongst others, viz: Commonwealth, etc., ex rel. Roberts & Schaefer Company, Case No. 3706, the relevant portions of which follow, the State Corporation Commission is of the opinion that the petition in this matter should be dismissed at the cost of the petitioner, and it will be so ordered.

The opinion in Com-onwealth, etc., ex rel. Roberts & Schaefer Company on the principal question herein involved, viz: the constitutionality of the Virginia law under [fol. 127] which the entrance fee of $5,000 in this case was required, and paid under protest, is as follows:

Opinion by FLETCHER, Commissioner:

* * * * * * *

Having reached the conclusion that the contention of the petitioner that there were no statutory enactments in Virginia which authorized the imposition of the additional entrance fee* and the additional annual registration fees

* This and every other reference to "additional entrance fee" were relevant to the Roberts & Schaefer case but are not relevant, from a factual standpoint, to the instant case, The same comment is applicable to all references to the assessment of "no par" stock upon the arbitrary basis of $100 a share. It is to be further noted that, while the petition in the instant case refers to the "annual registration fee", there is no specific prayer for relief in this regard as there was in the Roberts & Schaefer case. Some other portions of the excerpts from the opinion in the Roberts & Schaefer case, so intermingled as not to be easily eliminated,

can be readily recognized as having no bearing, except in principle, to the instant case.

complained of by the petitioner is untenable, there remains to be considered the contention of the petitioner that such statutory enactments are unconstitutional, and, in order to properly consider this contention, it seems advisable to summarize the acts necessary to be done by a foreign corporation in order to secure the right to do local business in Virginia and to continue to have such right.

(1) By virtue of section 3847 of the Code a foreign corporation must before doing business in the State present to the State Corporation Commission (a) a written power of attorney, executed in duplicate, appointing the Secretary of the Commonwealth of Virginia its agent, upon whom all lawful process shall be served and who shall be authorized to enter an apearance in its behalf (b) duly authenticated copies of the charter of the corporation, and (c) a certificate of the Auditor of Public Accounts *showing the payment of the fee required by law to be paid by such corporation, and shall obtain from the Commission a certificate of authority to transact business in the State;* and if, after it obtains such certificate of authority, its charter shall be amended, a duly authenticated copy of such amendment shall be presented to the Commission and filed as copies of the original charter are required to be filed, *and the fee required by law on such amendment shall be paid in the manner prescribed by law.* Such section also provides that the corporation shall pay the clerical fees for such certificate of authority and for filing papers as prescribed by law.

[fol. 128] (2) It must pay into the treasury of Virginia the fee required to be paid by section 3847 of the Code as a condition of receiving a certificate of authority to do business in Virginia, which fee is ascertained and fixed by section 207 of the Tax Code (section 38-A of the Tax Bill), and section 5 of chapter 48 of the Acts of 1919, the former section being applicable to ascertain and fix the fee where the corporation has only shares of stock with par value, the latter section being applicable to ascertain and fix the fee when the corporation has only shares of stock without par value and both of said sections being applicable to ascertain and fix the fee where the corporation has shares of stock

with par value and shares of stock without par value. This fee is called the "entrance fee" and *does not vary in direct proportion to the amount of authorized capital stock and it cannot exceed the sum of* $5,000.00.

(3) If, after having received such certificate of authority, the foreign corporation shall amend its charter so as to provide for additional shares of stock, it must pay upon filing the amendment to its charter providing for such additional shares of stock, an additional entrance fee, as required by section 3847 of the Code and which is determined as provided by section 208 of the Tax Code (section 39 of the Tax Bill) by ascertaining what would have been the entrance fee which the corporation would have had to pay had its maximum authorized capital stock been the same as that which it has as a result of the amendment and deducting from such fee the amount which the corporation paid, if any, when it secured the certificate of authority to do business in Virginia. The difference between the two fees, or the difference between what has been paid and $5,000.00, is the additional entrance fee required to be paid on filing the amendment. Where a foreign corporation having received the certificate of authority to do business in the State had all of its stock with par value and the amendment provides for additional shares of stock with par value, sections 207 and 208 of the Tax Code are applicable in the ascertainment of such additional entrance fee. In all instances where the corporation before receiving the certificate of authority had any shares of stock without par value or where the amendment provides for any class of shares of stock without par value, then sections 207 and 208 of the Tax Code and section 5 of chapter 48, Acts 1919, are applicable in the ascertainment of the additional entrance fee. *This additional entrance fee does not vary in direct proportion to the amount of authorized capital stock. It cannot exceed the sum of* $5,000.00 *less the amount paid, if any, for securing the original certificate of authority.*

[fol. 129] (4) It must, after being authorized to do business in Virginia, pay, as provided by section 210 of the Tax Code (section 41 of the Tax Bill), an annual registration fee, applicable alike to both domestic and foreign corporations, based on the amount of its authorized maximum capital stock, as of the first day of January of each year, begin-

ning on the first day of January following entrance into the state. In case of a foreign corporation having all of its capital stock with a par value section 210 of the Tax Code fixes the amount of such fee. Where the corporation has all of its shares without par value or shares partly with and partly without par value the amount of such fee is determined by section 210 of the Tax Code and section 5 of chapter 48. Such annual registration fee is "irrespective of any specific license fee or other tax or fee imposed by law upon said corporation for the privilege of carrying on its business in the State or upon its franchise property or receipts". The minimum fee is $5.00 and the maximum fee is $25.00, and *such fees does not vary in direct proportion to the amount of authorized maximum capital stock.* It is a fee not referred to in section 3847 of the Code prescribing the conditions upon which a foreign corporation may do business in the State and providing for procuring a certificate of authority to do business in the State and an additional entrance fee in the event that a corporation having received such certificate of authority amends its charter so as to increase the amount of its maximum authorized capital stock. It is a fee provided for by an independent statute passed in 1906 (Acts 1906, p. 516), which applied to both domestic corporations and foreign corporations doing, or authorized to do, business in Virginia and had no reference to either the entrance fee or the additional entrance fee. It is not a franchise tax, but it is a small fee presumably intended to reimburse the State for the clerical services incident to the regulation of both classes of corporations and the ascertainment of what is the amount of the authorized capital stock of the corporation on the first day of January of each year, and the preparation and sending to all such corporations doing business in Virginia on the first of January of such year of the forms for the report of the status, business and condition of the corporation as provided for by section 210 of the Tax Code, and the examination of such reports when returned to the Commission and the preservation of the same and the keeping of the records in connection therewith.

The foregoing constitutes an enumeration of all the steps required to be taken and all the fees required to be paid by the statutes of Virginia as a condition of the right of a for- [fol. 130] eign corporation to begin and to continue to do

business in Virginia. While by section 211 of the Tax Code domestic corporations are required to pay an annual franchise tax to the State of Virginia, based on the maximum authorized capital stock, which varies in proportion to the maximum authorized capital stock with no limitation upon the amount of such tax no such tax is imposed upon foreign corporations.

No question of the right of the petitioner to do in Virginia purely interstate business is here involved. The State of Virginia has no power to prohibit a foreign corporation from entering the State of Virginia and doing therein a purely interstate business; and the petitioner has the unquestioned right, by virtue of the commerce clause of the Federal Constitution, to enter Virginia and do therein an interstate business without securing a certificate of authority so to do from this Commission and to continue to do such business without filing any amendment to its charter increasing its maximum authorized capital stock. It has been consistently held by this Commission and the Court of Appeals of Virginia that sections 3847 and 3848 of the Code and section 207 of the Tax Code have no application to a corporation doing a purely interstate business and that the words "doing business" or "transacting business", as used in such statutory enactments, do not include the transaction of interstate business within the State, but mean, when applied to commerce, domestic business only—business which originates, is carried on, and is completed within the jurisdiction of the State of Virginia—what is often characterized as intrastate, as distinguished from interstate business General Railway Signal Co. v. Commonwealth, 118 Va. 301, 87 S. E. 598, aff'd 246 U. S. 500, 62 L. Ed. 854; Dalton Adding Machine Co. v. Commonwealth, 118 Va. 563, 88 S. E. 167, aff'd 246 U. S. 498, 62 L. Ed. 851; Western Gas Construction Co. v. Commonwealth, 147 Va. 235, 136 S. E. 646, aff'd 276 U. S. 597, 72 L. Ed. 723; Railway Express Agency v. Commonwealth, 153 Va. 498, 150 S. E. 418, aff'd 282 U. S. 440, 75 L. Ed. 450; Ku Klux Klan v. Virginia, 128 Va. 500, 120 S. E. 122.

Where the highest court of a state construes a statute as having no application to foreign corporations whose business in the State constitutes interstate commerce, this construction is conclusive upon the courts of the United States.

Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 243.

Sections 3847 and 3848 of the Code and sections 207 and 208 of the Tax Code and section 5 of chapter 48 of the Acts of 1919 have no application to a foreign corporation carrying on no intrastate business in Virginia but engaged only [fol. 131] in interstate commerce. This construction is plainly in harmony with the provisions of sections 153, 157 and 163, found in Art. 13 of the Constitution of Virginia. Section 157 relates to the fees to be paid by domestic and foreign corporations, and section 163 provides that "no foreign corporation shall be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it." Section 153 expressly provides as follows:

"The provisions of this Article shall always be restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation has been herein expressed in each case."

Therefore, by the mandate of the Constitution, general laws which the General Assembly is authorized by section 157 to enact so as to prescribe the terms and conditions upon which foreign corporations may secure a certificate of authority to do business in Virginia must be construed to apply only to intrastate business.

The Supreme Court of the United States has never held, as is said by the petitioner, that statutory enactments imposing the terms and conditions upon which a foreign corporation may do business in the State, which are similar to those involved in the present inquiry, are unconstitutional, but on the other hand it is believed has expressly upheld the validity of such legislation.

The objections as to the constitutionality of the Virginia statutes will now be considered.

2. *As to the contention that the statutes in question constitute an interference with or burden upon interstate commerce and are violative of the due process clause of the Federal Constitution.*

While the considerations of the above questions are not necessarily correlated, yet, as some of the principles involved are pertinent to both of them and as many of the cases which will be considered relate to both, the two questions will be considered together in order to avoid repetition in quotations from such cases.

The principal ground relied upon by the petitioner, in support of its contention that the statutory enactments imposing such initial entrance fee and additional entrance fees are unconstitutional under the United States Consti- [fol. 132] tution, is that they constitute an interference with and burden upon interstate commerce in violation of the commerce clause of the Constitution. The basis for such contention is that section 207 of the Tax Code and section 5 of chapter 48 of the Acts of 1919 and section 208 of the Tax Code providing how such entrance fees shall be computed, interfere with and burden interstate commerce, because they impose fee in the computation of which the maximum authorized capital stock is a factor as a condition of receiving and continuing to have the benefit of a certificate of authority to do intrastate business in Virginia, and that each of sueh sections therefore is unconstitutional when attempted to be applied to a foreign corporation doing both an interstate and intrastate business. The primary question to be determined is whether or not a State may require a foreign corporation, seeking to procure a permit, or, as it is termed in Virginia, "a certificate of authority", to do intrastate business separate and distinct from interstate commerce, to pay, as a condition of securden interstate commerce, because they impose fees in the computation of which the maximum authorized capital stock is a factor, *but which does not vary in direct proportion to the capital stock and which cannot exceed a certain fixed maximum*, for such is the character of the fee imposed by the statutory enactments of Virginia in question.

It is no longer an open question that a corporation, being solely a creature of law, can have no power beyond that of the law which gives it birth, and that it has no right to exist under other laws or in other states except by comity. In other words, a corporation being an artificial creature cannot demand that any government, except its creator, shall recognize its corporate creation without the consent of that government. This was clearly enunciated in the leading,

and in fact the first great case upon the subject in the United States, Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274, decided in 1839, in which Mr. Chief Justice Taney, rejected the earlier theory of Mr. Chief Justice Marshall in Bank of United States v. Deveaux, 5 Cranch. (U. S.) 61, 3 L. Ed. 38, decided in 1809 (where it was held that though the right to sue in a Federal Court is based, among other factors, on diversity of citizenship, and though a corporation could not be a citizen, yet the court could look through the corporate entity to the persons composing the corporation, and federal jurisdiction could thereby be acquired), and said:

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by [fol. 133] force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. * * *"

Except by the law of comity, no corporation created in one state has the power to do local business in another or to exercise its corporate functions therein. Its very life is the franchise granted by its parent state, and it is the creation of the law of such state, which has no extraterritorial force.

In Paul v. Virginia, 8 Wall (U. S.) 168, 19 L. Ed. 357, Mr. Justice Field said:

"Now, a grant of corporate existence is a grant of special privilege to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy."

Such rule of comity exists and is enforced by the courts in every nation and every state of the Union until destroyed by the law making power.

In Bank of Augusta v. Earle, supra, Mr. Chief Justice Taney said:

"We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union."

In Christian Union v. Yount, 101 U. S. 352, 25 L. Ed. 888, Mr. Justice Harlan said:

"In harmony with the general law of comity obtaining among the States composing the Union, the presumption [fol. 134] should be indulged that the corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its charter, unless it is prohibited from so doing; either in the direct enactments of the latter State or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest courts."

A state, however, may forbid and prevent a foreign corporation from carrying on its business within its limits, and also from doing certain acts or making contracts within its jurisdiction.

In Paul v. Virginia, supra, Mr. Justice Field said:

"Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contract upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

The principle was established in Bank of Augusta v. Earle, supra, that a state may refuse to admit a corporation organized in a foreign jurisdiction whose purpose is to do

business inside the state, either solely or in addition to its interstate business, and, within certain limits hereinafter stated, may place conditions on the privilege of entering the state.

That a corporation organized under the laws of one state may not carry on local business in another without the latter's permission, either express or implied, was again declared in Hemphill v. Orloff, 277 U. S. 537, 72 L. Ed. 978, where Mr. Justice McReynolds, delivering the opinion of the court, said:

"It is settled doctrine that a corporation organized under the laws of one state may not carry on local business within another without the latter's permission, either express or implied. A corporation is not a mere collection of individuals capable of claiming all benefits assured them by Sec. 2, Article 4, of the Constitution. * * * 'The clause of the Constitution referred to certainly never intended to give to [fol. 135] the citizens of each state the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question'."

In Prudential Ins. Co. v. Cheek, 259 U. S. 530, 548, 66 L. Ed. 1044, 1051, Mr. Justice Pitney, delivering the opinion of the court, said:

"But the right to conduct business in the form of a corporation, and, as such, to enter into relations of employment with individuals, is not a natural or fundamental right. It is a creature of the law; and a state, in authorizing its own corporations or those of other states to carry on business and employ men within its borders, may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient, in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact."

In Perkins Mfg. Co. v. Clinton Construction Co., 295 Pac. 1, (decided December 30, 1930), the Supreme Court of California said:

"The law is well settled that a state by virtue of its police power may entirely exclude foreign corporations from the right to do intrastate business within its borders, and, therefore, may permit them to do business here upon such conditions or subject to such restrictions as it may see fit to impose * * *."

It follows, therefore, that migratory corporations may be brought under the cognizance and control of the state into which they migrate if such corporations propose to do intrastate business within such state. We may take judicial notice that a large part of the business of the country is done by corporations which have become ever increasingly larger business units and which tend to spread their activities throughout the country. Under such circumstances and when, as at present, many states are vying with other [fol. 136] states in the effort to secure the revenue resulting from the organization therein of corporations which never expect to and never will engage in business in the incorporating state, but are formed to do business in some particular state or in states other than the state of their creation, the following statement of Mr. Justice Field, delivering the opinion of the court in Paul v. Virginia, 13 Pet. (U. S.) 519, 19 L. Ed. 357, decided in 1869, seems prophetic rather than descriptive of the time in which it was uttered:

"There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. * * * *And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction,* it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. *The principal business of every state would, in fact, be controlled by corporations created by other states.*" (Italics ours.)

Notwithstanding certain apparent dicta found in some of the opinions of the Supreme Court of the United States, though the language used is really not dictum, for it was

used in respect to the peculiar facts of the case under consideration or with reference to statutes of a nature different from those involved in the case at bar, it seems to be settled, both on principle and by authority, that the states, by what is known as comity or governmental courtesy in permitting foreign corporations to come within their borders for the purpose of engaging therein in purely intrastate business, either solely or in addition to interstate business, may make any conditions as antecedent requirements to their demand for such purpose, except to require them to give up their constitutional rights secured to them by the Federal Constitution. Hanover Fire Insurance Company v. Carr, 272 U. S. 494, 71 L. Ed. 373; Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288; Cyclone Mining Co. v. Baker Light, etc., Co., 165 Fed. 996.

While, as a general rule a state may forbid and prevent a foreign corporation from carrying on its business within its limits, and also from doing certain acts or making certain contracts within its jurisdiction, or from exercising its corporate functions within the state, there are certain exceptions to this general rule. Such exceptions are (1) where the corporation is engaged *strictly* in interstate and/or foreign commerce, and (2) where the corporation is engaged in the business of the Federal Government. Pem- [fol. 137] bina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Stockton v. Baltimore & N. Y. R. Co., 32 Fed. 9; People v. Wemple, 131 N. Y. 64, 29 N. E. 1002; National Council v. State Council, 104 Virginia 197, 51 S. E. 166, aff'd 203 U. S. 151, 51 L. Ed. 132; Railway Express Agency v. Commonwealth, 153 Va. 498, 150 S. E. 419, affirmed by the Supreme Court of the United States on February 2, 1930, 282 U. S. 440, 75 L. Ed. 450; Floyd v. National Loan & Investment Co., 49 W. Va. 327, 38 S. E. 653.

In Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, Mr. Justice Field said:

"The clauses of the Federal Constitution, with which it was urged in the state Supreme Court that the statute conflicts, are the one vesting in Congress the power to regulate foreign and interstate commerce, the one declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several states, and the one em-

bodied in the Fourteenth Amendment declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws. It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employes. * * * The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one state cannot, with some exceptions, to which we shall presently refer, do business in another state without the latter's consent, express or implied. In Paul v. Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, this court, speaking of a foreign corporation * * * said: 'The recognition of its existence even by others states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their consent, it follows as a matter of course that such consent may be granted upon [fol. 138] such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion.' A qualification of this doctrine was expressed in Pensacola Telegraph Company v. Western Union Telegraph Comany, 96 U. S. 12, 24 L. Ed. 711, so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress. * * * And undoubtedly a corporation of one state, employed in the business of the General Government, may do such business in other states without obtain-

ing a license of *Mr.* them. Thus, to take an illustration from the opinion of *Mr. Justice* Bradley in a case recently decided by him, 'If Congress should employ a corporation of ship builders to const-uct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union', and, we may add, without the permission and against the prohibition of the state. Stockton v. Baltimore & N. Y. R. Co., 32 Fed. Rep. 9, 14. These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or interstate commerce, or not employed by the government. As to these corporations the doctrine of Paul v. Virginia applies, The Colorado Corporation does not come within any of the exceptions. Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employes, was a matter dependent on the will of the state. It could make the grant of the privilege conditional upon the payment of a license tax, *and fix the sum according to the amount of the authorized capital of the corporation.* The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the state. * * * We do not perceive the pertinency of the position advanced by counsel that the tax is question is void as an attempt by the state to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. *No tax* upon the franchise of the foreign corporation is *levied,* nor upon its business or property without the state. A license tax only is exacted *as a condition* of its keeping an office within the state for the use of its officers, stockholders, agents, and employes; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent. * * * Nor does the clause of the Constitution [fol. 139] declaring that the 'citizens of each state shall be entitled to all privileges and immunities of citizens in the several states' have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. * * * The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions

for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is *strictly* commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by state authority." (Italics ours.)

In National Council v. State Council, 104 Virginia 197, 51 S. E. 166, aff'd 203 U. S. 151, 51 L. Ed. 132, the same principle was laid down.

The commerce clause of the Federal Constitution denies to states the power to impose conditions which amount to a direct burden on the interstate business or international business of a foreign corporation, but this applies *solely* to the business of a corporation which is interstate or international or constitutes interstate or international commerce. The mere fact that a foreign corporation is engaged in interstate commerce or foreign commerce does not prevent the domestic state from imposing conditions upon that portion of its business which is carried on exclusively within the state, provided such conditions do not constitute a burden upon the interstate or foreign commerce carried on by such foreign corporation.

In Railway Express Agency v. Commonwealth, 153 Va. 498, 150 S. E. 419, affirmed 282 U. S. 440, 75 L. Ed. 450, there was involved an appeal from an order of the State Corporation Commission refusing the Railway Express Agency, a Delaware corporation, a certificate of authority to engage in intrastate express business, such refusal being based upon section 163 of the Constitution of Virginia, which reads in part as follows:

"No foreign corporation shall be authorized to carry on, in this state, the business, or to exercise any of the powers or functions of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the [fol. 140] Constitution and laws of this state, where the same can be made applicable to such foreign corporations without discriminating against it."

It was contended by the Express Company that to refuse to permit it to engage in intrastate business over the lines

of the railroads would be a denial of the equal protection of the law, and would also constitute an illegal burden upon interstate commerce. Campbell, J., in delivering the opinion of the court, said:

"The effect of the refusal of the State Corporation Commission to grant to the express company a certificate of authority to do an intrastate business in the Commonwealth is but putting into execution the statutory regulations applicable to all foreign corporations which seek to enter the state and engage in competition with domestic corporations engaged in a similar business. There is no effort to deny to plaintiff that right guaranteed both by the state and Federal Constitutions to engage in interstate commerce. It is the policy of this State to open wide its doors that capital may find a secure investment in industries under the protection of its laws; but the law is well settled that the entrance into the state by a foreign corporation for the purpose of doing business therein, is not an arbitrary right. The state, under the powers expressly reserved under the Federal Constitution, has the power to impose conditions. The only condition here imposed is that the foreign corporation must stand, not above, but on a parity with those domestic corporations which pay taxes to the state for the protection afforded them, and are willing to submit themselves to the jurisdiction of its courts.

"In Hemphill v. Orloff, 277 U. S. 537, 48 S. Ct. 577, 579, 72 L. Ed. 978, it is said: 'It is settled doctrine that a corporation organized under the laws of one state may not carry on local business within another without the latter's permission, either express or implied. A corporation is not a mere collection of individuals capable of claiming all benefits assured them by section 2, article 4, of the Constitution.'

"In Ashley v. Ryan, 153 U. S. 436, 38 L. Ed. 773, several railroad corporations existing under the laws of separate states consolidated into one corporation. The statute of Ohio in which such consolidated corporation operated in part imposed a charge upon the consolidated company of a percentage of its authorized stock as the fee of the state for the filing of the articles of consolidation in the office of the [fol. 141] secretary of state of Ohio, without which filing it could not possess the powers, immunities and privileges which appertain to a corporation in that state. It was contended that this fee was a tax on interstate commerce, the

consolidated carrier being engaged therein, or a tax on the right to carry on same, or on same, or on the instruments thereof. In denying this contention, the Supreme Court said: 'The purpose of the tender of the articles of consolidation to the secretary of state was to secure to the consolidated company certain powers, immunities and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent they could not have been procured. Revised Statutes of Ohio, sections 3239, 3382 and 3384b, amended by act of April 11, 1890 (87 Ohio Laws, 183 [184]). Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities and powers which it could by no means possess, save by the grace and favor of the Constitution of the state of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the state charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the state and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. That the right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties is settled.'

"In Pembina Con. Silver Mining, etc., Co. v. Pennsylvania, 125 U. S. 189, 31 L. Ed. 650, the court said: 'The state [fol. 142] is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may, therefore, require for the admission within their limits of the corporations of other states, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the fourteenth amendment. * * * The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by state authority."

The Supreme Court of the United States on February 2, 1930, 282 U. S. 440, 75 L. Ed. 450, affirmed the judgment of the Supreme Court of Appeals of Virginia, the reasons therefor appearing in the opinion of Mr. Justice Holmes, who delivered the opinion of the court and who said:

"This is an appeal from a judgment of the Supreme Court of Appeals of Virginia affirming an order of the Corporation Commission that denied to the appellant a certificate of authority to do an intrastate express business in Virginia. 153 Va. 498, 150 S. E. 419. The appellant was incorporated in Delaware, in December, 1928, and was given by its charter not only power to engage in interna-

tional, interstate and intrastate express business, but other most extensive ones to own personal and real property and to engage in other collateral undertakings. Its stock was to be owned by railroad corporations. It has bought the business and assumed the liabilities of the American Railway Express Company, and is an agency of railroads throughout the United States. The appellant's [fol. 143] right to do interstate business is not questioned, but it was held by the Supreme Court of Appeals that being a foreign corporation created since the Constitution of the state went into effect in 1902, it was prohibited by that instrument from doing intrastate express business by the plain words of section one hundred and sixty-three. The appellant says that so construed the prohibition is *a direct burden upon the interstate commerce which is its principal business,* and therefore is void. It also invokes the Fourteenth Amendment for some help. There is not here, as there was in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, and Pullman v. Kansas, 216 U. S. 56, 54 L. Ed. 378, a deliberate attempt to use the state's powers as the means for attaining the unconstitutional result of taxing property outside the state. Western Union Telegraph Co. v. Foster, 247 U. S. 105, 114, 62 L. Ed. 1006, 1016. Virginia is not attempting to go beyond its power by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit *to transact local business* without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would impose a burden on interstate commerce and it is presumed to be constitutional. O'Gorman & Young v. Hartford F. Ins. Co., January 5, 1931." (Italics ours.)

This latest utterance of the Supreme Court of the United States recognizes the right of the state to prohibit a foreign corporation engaged in interstate commerce from doing intrastate business therein and to refuse to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business is proposed to be done, and that where there is no substantial evidence that the refusal would impose a burden on interstate commerce, it is presumed to be constitutional. The constitutional provision involved in such case, which denied to the foreign express company

which was engaged in interstate business the right to engage in intrastate business and required it to take out a charter in Virginia in order to transact local business, would certainly be a greater burden upon interstate commerce than is the requirement that a foreign corporation seeking to do in Virginia local business separate and distinct from interstate commerce must pay the initial entrance fee and additional entrance fee in the computation of which authorized capital stock is a factor but which does not vary in direct proportion to capital stock and has a fixed maximum.

[fol. 144] In Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 71 L. Ed. 372, Mr. Chief Justice Taft, delivering the opinion of the court, said:

"It was settled in * * * Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972, and Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. Ed. 164, *that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction.* But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated in respect to the breach of the commerce clause of the Constitution by the cases of Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. Ed. 193, 197, and Looney v. Crane Co., 245 U. S. 178, 188, 62 L. Ed. 230, 235. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts has been held void; (Terral v. Burke Constr. Co., 257 U. S. 529, 66 L. Ed. 352); in cases in which the state has vainly attempted to subject foreign corporations to a payment of *a tax which is a tax not only on the property of the corporation in the state but also on its property without the state,* in violation of the due process clause of the 14th Amendment (Western

U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297); and finally, in cases of a class to which it is contended that present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws (Southern R. Co. v. Greene, 216 U. S. 400, 54 L. Ed. 536; Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. Ed. 169). In the former of these last two cases a railway corporation of another state *had come into Alabama* and secured a license to do business therein as an intrastate railway and in course of that business had acquired in the state property of a fixed and permanent nature upon which it had paid all the taxes levied by the state. It was held that *a new and additional franchise tax* for the privilege of doing business within the [fol. 145] state, not imposed upon domestic corporations doing business in the state of the same character, violated the equal protection clause. In Air-Way Electric Appliance Corp. v. Day, a corporation of Delaware had much or all of its property in Ohio *where it was duly authorized to do business. Thereafter* a law of Ohio imposed 5 cents a share upon a certain proportion of non-par shares authorized by the state of Delaware, which the court found to be arbitrary and not based on a classification of foreign corporations having any reasonable basis." (Italics ours.)

In Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. Ed. 657, Mr. Justice McKenna, delivering the opinion of the court, in holding that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, except with respect to business of a federal nature, said:

"The claim is, if we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention, * * * cases are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and the court, finding the meaning of the statutes plain, decided that it could not be changed by construction even to save the statutes from unconstitutionality. This was but an exercise of judicial

interpretation. The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that state mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. * * * A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. *It has even a broader application to foreign corporations.* * * * In Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, the dependent and derivative rights of corporations were again declared. Bank of Augusta v. Earl, was quoted from, and it was again decided that a corporation is the mere creation of local law, and can have no legal existence beyond the limits of [fol. 146] the sovereignty where created, and the recognition of its existence in other states and the enforcement of its contracts made therein depend purely upon the comity of those states. * * * And it was also decided that a corporation did not have the rights of its personal members, and could not invoke that provision of sec. 2, article 4, of the Constitution of the United States, which gave to the citizens of each state the privilege and immunities of citizens of the several states. See also Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972. And it has since been held in Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432, and Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552, that the prohibitive words of the Fourteenth Amendment have no broader application in that respect. * * * In Hooper v. California, 155 U. S. 648, 39 L. Ed. 297, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the state. All preceding cases were cited, and *it was assumed as settled 'that the right of a foreign corporation to engage in business within a state*

other than that of its creation depends solely upon the will of such other state.' And the *exception* to the rule was stated to be *'only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the federal nature of its business'.''* (Italics ours.)

The requirements of such permit or certificate of authority of foreign corporations, other than those embraced in the excepted classes above mentioned, is not of itself unlawful and only becomes so when the conditions of obtaining such permit or certificate of authority violate the fundamental law of the state and/or of the United States. The determination of whether such conditions or restrictions are unlawful depends upon whether the statute imposing them is on its face inherently repugnant to the Constitution, or whether by their necessary operation and effect in the particular case, they are so repugnant. It necessarily follows that a statute may be valid when applied to the facts of a particular case and invalid when applied to the facts of a different case. Cooley's Constitutional Limitations (8th Ed.) 366; Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 202, 289, 66 L. Ed. 418, 422; Cudahy Packing Co. v. Parramore, 263 U. S. 418, 422, 68 L. Ed. 366, 369; Singer [fol. 147] Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. Ed. 974; City of Emporia v. Norton, 13 Kan. 569.

In Ratherman v. Western Union Telegraph Company, 127 U. S. 411, 32 L. Ed. 229, it was held that a state statute which interferes with interstate commerce, while invalid in so far as it does so, may be valid in its application to intrastate commerce.

In Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85, 58 L. Ed. 127, 134, in upholding an annual excise tax based on the authorized capital stock of a foreign corporation with a fixed maximum, Mr. Justice Day, delivering the opinion of the court, said:

''Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases.''

This statement was quoted with approval by Mr. Justice Day in Kansas City, Memphis & Birmingham Railroad Co.

v. Stiles, 242 U. S. 111, 61 L. Ed. 177, and by Mr. Justice Hughes in Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 277, 60 L. Ed. 617. The same rule obtains in considering a statute requiring a foreign corporation to pay an entrance fee as a condition of admission into the state for the purpose of doing local or intrastate business therein.

If these principles for determining the validity of statutes are followed, not only will the validity of the statutes involved in the consideration of the case at bar be established, but the apparent confusion and contradictory statements found in the cases upon which the petitioner relies will be explained and their apparent relevancy to the issues here involved be destroyed. As has been heretofore stated, the initial entrance fee and additional entrance fee here involved are imposed *solely as conditions of the obtaining by a foreign corporation of a certificate of authority to do an intrastate business in Virginia, and of the continuance of the authority to enjoy the rights and privileges resulting therefrom and conferred thereby.* Such fees are the *only fees,* (except the registration fee) *which the corporation is ever required to pay.* When such fees are paid the foreign corporation may for all time and forever do in Virginia any and all intrastate business it pleases, within its corporate powers and consistent with the police laws of the state. Indeed, when the foreign corporation has procured such certificate of authority and such fees are paid, there is no limitation upon the [fol. 148] extent of the activities in which it may engage, nor with respect to the property it may acquire and hold, nor with respect to business transactions and the enjoyment of rights and privileges. It is put on a plane with domestic corporations, save that it does not have to pay the annual franchise tax which domestic corporations have to pay. It may be observed further that in case of a domestic corporation having the same capitalization as the petitioner, such annual franchise tax (from which the petitioner is exempt) would amount to $1,100.00. When a corporation is organized in Virginia it is required to pay a certain charter fee, and when it increases its capital stock it is required to pay an additional fee, determined as provided by section 208 of the Tax Code. On what grounds can a foreign corporation, applying for a certificate of authority to do business in Virginia, complain if it is required, as a condition of procuring such certificate of authority to pay an initial entrance

fee—which is analogous to the charter fee paid by a domestic corporation when its charter is issued—and an additonal entrance fee when it increases its capital stock, which is measured by the same standard as the additional fee so required to be paid by a domestic corporation, and which does not vary in direct proportion to the maximum authorized capital stock and has a fixed maximum? Why should a "tramp" corporation—which is a corporation chartered in one state usually by the citizens of another state, without any intention of doing business in the former state, but, solely to operate in other states—not be required, when it applies for a certificate of authority to do business in Virginia, to pay fees similar to those which are required to be paid by corporations created under the laws of Virginia? If foreign corporations are to escape the payment of entrance fees when they procure a certificate of authority to do business in Virginia and to exercise their corporate activities and functions therein, then there will be likely to arise conditions where a large proportion of the corporate activities in a state will be conducted by corporations formed under the laws of other states which maintain veritable corporate mills to grind out charters, and where small incorporation fees are required and stockholders' and directors' meetings may be held at any place, and the laws of the states by which the yare formed will be projected into the State of Virginia, which will have no power to regulate the internal management of the creatures of such laws—foreign corporations conducting some, or a greater part, and in some instances all, of their corporate activities in Virginia.

It will not be presumed that it will be contended by the petitioner that a state is powerless to exact any fee as a [fol. 149] condition of issuing a permit or certificate to carry on intrastate business in the state.

Assuming that a state has the right to require an entrance fee as a condition of issuing a certificate of authority to a foreign corporation to do intrastate business in the state and/or to exercise all or any part of its corporate functions within the limits of such state, the question now to be considered is whether the initial entrance fee and/or the additional entrance fee required to be paid by the statutes in question violate the commerce clause or due process of law clause of the Federal Constitution. Such fees do not vary

in direct proportion to the capital stock of the corporation and a maximum is fixed. Thus the initial fee, when the maximum authorized capital stock is $50,000.00 or less, is $30.00; where such capital stock is over $50,000.00, and does not exceed $1,000,000.00, 60c for each $1,000.00 or fraction thereof; over $1,000,000.00 and not to exceed $10,000,000.00, $1,000; over $10,000,000.00 and not to exceed $20,000,000.00, $1,250.00; over $20,000,000.00 and not to exceed $30,000,000.00, $1,500.00 and so on up to $90,000,000.00, and over $90,000,000.00, $5,000.00. The additional entrance fee is computed on the same basis as the initial entrance fee and does not vary in direct proportion to the capital stock and credit is give- for the amount of the initial fee, and there is the fixed maximum of $5,000.00.

It will not be contended that the state would not have the power to require outright of all corporations proposing to engage solely in intrastate business in the state or intrastate business separate and distinct from intrastate business in which it had already been engaged, the payment of a flat fee as a condition of securing a permit or certificate of authority to do intrastate business in the state or to exercise its corporate functions within the state, when such business and corporate functions are in no wise connected with interstate business or business of the Federal Government. The right of a state to charge such a fee was stated in Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 296, 66 L. Ed. 622, 626, where there was involved the validity of a tax upon a foreign corporation based upon the proportion of its authorized capital stock represented by property located and business transacted in a state other than that of its creation, and where Mr. Justice Clarke, citing Maine v. Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, said.

"If this same amount of tax had been imposed upon such a manufacturing corporation, as we have here, without reference being made to the basis of its computation, very cer- [fol. 150] tainly no objection to its validity would have been thought of."

If such fee were fixed at $25.00, it would not be contended that it imposed a burden upon interstate commerce if the corporation was engaged solely in intrastate business or if it was engaged in intrastate business and interstate business which were separate and distinct and not inseparably

commingled or if it was engaged in business which did not constitute commerce and proposed solely to exercise its corporate functions in no wise connected with interstate commerce in Virginia or that it was an attempt to tax property beyond the jurisdiction of the state and, therefore, violative of the due process clause of the Federal Constitution. Why, then, if a state would have the right to require outright of all foreign corporations payment of a fee in the sum of $1.00 or $25.00 or $1,000.00, as a condition of securing a permit to do intrastate business in Virginia or intrastate business and also interstate business, when such businesses are separate and distinct and in no way interdependent, or to exercise its corporate functions in the state, in no wise related to the business of interstate commerce, should we regard as invalid a law which less arbitrarily seeks to relate the fee to the magnitude and value of the privilege conferred? The entrance fee, composed of the initial entrance fee and the additional entrance fee, which is a part of the condition of securing the certificate of authority, is not in any sense a tax upon property. It is, in fact, a relatively small burden and does not purport to have any relation to the amount of business, intrastate and/or interstate, transacted, or property owned within and/or without the state, and in fact bears none. It is a *single* charge for the privilege of entering the state, and there exercising its corporate functions in the transaction of intrastate business for an indefinite period. It is imposed alike upon all foreign corporations transacting local business in the state, including those which have no interstate transactions at all. It cannot be reasonably contended that a state would not have the right to impose such a charge upon a foreign corporation, chartered in another state and without any intention of doing business in that state, but solely to operate in Virginia, or upon a foreign corporation proposing to transact only an intrastate business in Virginia, or that as to such corporations the requirements as to the procuring of such certificate of authority and the payment of such initial entrance fee and additional entrance fee would be violative of the commerce or the due process of law clauses of the Fed-
[fol. 151] eral Consitution. It is true that any exaction from a foreign corporation engaged in both intrastate and interstate business may be said to affect the latter but by engaging in both classes of business a corporation cannot,

in effect, nullify the power of the state respecting the class which is admittedly subject to its control. The fee is imposed as a condition of securing the right to exercise the corporate functions of the corporation in Virginia, without regard to whether or not the corporation is, or has ever been engaged, or ever proposes to engage, in interstate commerce, or is, or has ever engaged in business of any kind, or has done or performed any corporate acts or exercised any corporate functions in Virginia, and without regard to whether it has, or has ever had, any property in Virginia, or elsewhere, or ever proposes to have any such property. It is imposed solely for the privilege, and is a part of the condition of having extended to it recognition of its existence as a creature of the laws of another state, and being accorded the same rights and privileges as if it were a creature of the laws of Virginia. It is a charge which the foreign corporation must pay to become a quasi-citizen of the state and entitled to many equal privileges with citizens of the state. It will not be disputed that a state may exact fees from a domestic corporation, measured by the amount of its authorized capital stock as a condition of issuing to it a charter. Such fees cannot possibly be claimed to burden interstate commerce or impose a tax upon the property beyond the jurisdiction of the state. Roberts & Schaefer v. Emmerson, 271 U. S. 50, 70 L. Ed. 827, aff'g 313 Ill. 137, 144 N. E. 818. No logical reason can be advanced why a foreign corporation proposing or desiring to engage in intrastate commerce or to exercise its corporate functions not in any way connected with interstate commerce in a state other than that by which it was created should claim that the imposition of an entrance fee, imposed as a condition of its receiving a certificate of authority to do intrastate business or to exercise such corporate functions in the state, and for the continuance of the right to enjoy the benefits resulting from such certificate of authority, would interfere with or burden interstate commerce or deprive the foreign corporation of its property without due process of law in violation of the 14th Amendment to the Federal Constitution. It is, on principle, absolutely analogous to the charter fee exacted of domestic corporations as distinguished from the annual franchise tax payable by domestic corporation.

There are no facts before the Commission which show, or in any wise tend to show, that, when the petitioner applied

[fol. 152] to the Commission in 1914 for a certificate of authority to do business in Virginia and to exercise its corporate functions therein and paid, as a condition of obtaining such certificate, the sum of $60.00, it had ever transacted in Virginia or elsewhere any business of any kind, intrastate or interstate, or had any property of any kind at any place whatsoever. While there are no facts before the Commission to show whether it transacted any business in Virginia, intrastate or interstate, from 1914 to 1921, or whether between 1914 and July 1, 1921, when it increased its capital stock, it had at any time any property in Virginia, it does appear that during the year 1921 the *petitioner did no business, either intrastate or interstate, in Virginia,* and that the only property, if any, in Virginia at any time prior to 1928 owned by the petitioner had been construction equipment temporarily located in Virginia and employed in its business, from which, inasmuch as during the year 1921, (when the petitioner increased its capital stock and should have filed the amendment to its charter and have paid the *additional entrance fee* now involved), it was doing no business of any kind, intrastate or interstate, in Virginia, it may properly be presumed that it was employing no construction equipment therein and consequently had no property in Virginia. There is nothing in the record in this case to show that the intrastate business in Virginia in which the petitioner is shown to have engaged since 1921 has been, or is in any way connected with its interstate business conducted in Virginia and/or elsewhere, or that its intrastate business of contracting and construction has been or is in any way commingled with or dependent upon its interstate business. The contracting and construction business, as the term is generally used, means the business of contracting to construct, erect or build works, buildings, or structures, and the building, erection, or construction thereof. The term "contractor" has come to be used with respect to one who contracts, whether with a government or other public body, or with private parties, to construct works or to erect buildings or to perform any work or service at a certain price and to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece or job of work for other persons, using his own means and methods without submitting himself to control as to petty details. 13 Corpus Juris 211. And the

term "construction" used in connection with the term "contractor" means the erection of buildings, railroads, bridges, or any other structures. 12 Corpus Juris 1299. The intrastate operations of the petitioner are by their very nature separate and distinct from any interstate oper- [fol. 153] ations in which it may be engaged. Any fee paid for the privilege of conducting its intrastate operations may lessen the profits therefrom but it cannot affect the earnings from its interstate business conducted in Virginia or outside of Virginia, and consequently it does not interfere with or burden such interstate business. If the intrastate business is unprofitable, the foreign corporation may withdraw therefrom and surrender its certificate of authority to do business in Virginia, and such withdrawal and surrender will not in any way affect its interstate business in Virginia or elsewhere. It could have surrendered its certificate of authority to do intrastate business in Virginia just prior to obtaining the amendment in question, but it did not elect to do so.

It is settled, as a general rule, that a foreign corporation cannot do intrastate business in a state except by the consent of such state and that the state may exclude it arbitrarily or impose such conditions as it will upon its engaging in such business within the jurisdiction of such state. Mr. Chief Justice Taft, in Hanover Fire Ins. Co. v. Carr, 217 U. S. 494, 71 L. Ed. 372, delivering the opinion of the court, which has heretofore been quoted from at length, stated the general rule, and after so doing, stated the qualifications thereof. None of the exceptions stated apply to the case now under consideration, unless it be held that a state has no power to impose any entrance fee upon a foreign corporation applying for a permit to do intrastate business in such state or to exercise its corporate functions therein which do not constitute commerce, if such foreign corporation is engaged in interstate business, either in Virginia or elsewhere, even though such fee is imposed but once and is made the condition of procuring such permit, and does not vary in direct proportion to the authorized capital stock and has a fixed maximum. It would seem from the contention of the petitioner that a statute imposing any such fee, if in any way based upon authorized capital stock or in which authorized capital stock is a factor, would be unconstitutional, even though the foreign corpo-

ration intended only to do intrastate business in Virginia or to exercise corporate functions therein, not relating in any way to commerce, if such corporation was authorized by its charter to engage in interstate business, notwithstanding the fact that it had never engaged therein and there was nothing to show that it ever proposed to engage therein. If such contention be carried to its logical conclusion, any requirement imposed upon a foreign corporation as a condition of doing local business in a state, separate and distinct from interstate commerce, is unconstitutional, if the corporation is engaged in interstate commerce at the [fol. 154] time when it seeks to enter the state to do local business, and a foreign corporation can by engaging in interstate business, evade or avoid the provisions of the Virginia statutes imposing the entrance fee and additional entrance fee as a condition of receiving a certificate of authority to do local business in the state and of the continuance of the benefits resulting therefrom. This contention is, however, unsound. A foreign corporation cannot avoid and circumvent such statutes by engaging in interstate business along with local or intrastate business.

In Sunlight Produce Co. v. State, 35 S. W. (2d) 342, decided March 9, 1931, by the Supreme Court of Arkansas, Humphreys, J., said:

"The sole question presented by the appeal for determination is whether the undisputed testimony reflects that appellant was engaged in *any* intrastate business in Boone County, Ark. It has been ruled by this court that a foreign corporation comes within the purview of the statutes referred to in case they do any intrastate business so far as that character of business is concerned, even though also engaged in interstate commerce or business. Western Union Tel. Co. v. State, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82. A foreign corporation cannot avoid or circumvent the statutes by engaging in interstate business along with local or intrastate business. In other words; the courts will not permit a foreign corporation to camouflage an intrastate business with interstate business so as to evade or avoid the penalty imposed by the statutes for doing an intrastate business without complying with the law." (Italics ours.)

A different situation might arise where the intrastate business and the interstate business of the corporation are so inextricably interwoven and interdependent that they cannot be separated, but this is not true in the case now under consideration where there is nothing in the facts before the Commission to indicate that the intrastate and interstate business of the petitioner are so interwoven or interdependent, nor indeed, is any connection between the two established, and the nature of the business, on the contrary, indicates a necessary separation. Western Gas Construction Co. v. Commonwealth, 147 Va. 235, 136 S. E. 646, affirmed 276 U. S. 597, 72 L. Ed. 723.

While the petitioner in its brief contends to the contrary, it is confidently asserted, however, that the Supreme Court [fol. 155] of the United States has never held that such a fee, even though measured by a given per cent of the authorized capital stock or issued capital stock of the corporation or, being a fixed sum, would constitute an illegal burden upon the interstate commerce in which the foreign corporation was engaged or in which it might in future engage if such fee was imposed *solely* as a condition of the securing by the foreign corporation of a permit to do *local*, or intrastate, business in the state, separate and distinct from the interstate business in which the foreign corporation was or might be engaged.

The Supreme Court of the United States in General Railway Signal Co. v. Virginia, 246 U. S. 500, 62 L. Ed. 854, affirming 118 Va. 301, 87 S. E. 598, has upheld the validity of the entrance fee imposed by section 38-a of the Tax Bill (which was the same as section 207 of the Tax Code). This case was decided by a unanimous court on April 15, 1918, and the correctness of the decision has never been questioned by the Supreme Court of the United States. Mr. Justice McReynolds, delivering the opinion of the court, said:

"It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock, it constitutes a burden on interstate commerce, contrary to the Federal Constitution.

"Section 38-a, chap. 53, acts of Virginia, 1910 • • • requires every foreign corporation with capital over $1,000,000, and not exceeding $10,000,000, when it obtains a certificate of authority to do local business, to pay a fee

of $1,000. Inspection of the statute shows that prescribed fees do not vary in direct proportion to capital stock, and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is $1,000, and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.

"Considering what we said in Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127; St. Louis, Southwestern R. Co. v. Arkansas, 235 U. S. 350, 50 L. Ed. 265; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. Ed. 176, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See Looney v. Crane Co., 245 U. S. 178, ante, 230; International Paper Co. v. Massachusetts, 246 U. S. 135, ante, 624, and Locomobile Co. v. Massachusetts decided March 4, 1918, 246 U. S. 146, ante, 631)."

[fol. 156] It is true that the General Railway Signal Co. case dealt only with the initial entrance fee imposed by section 38-a of the Tax Bill (now section 207 of the Tax Code), but, as stated before, the additional entrance fee is part of the entrance fee required to be paid as a condition of procuring the certificate of authority to do a local business in Virginia. The holding in such case is, therefore, equally applicable to the additional entrance fee imposed if and when the foreign corporation increases its capital stock and, therefore, such additional entrance fee likewise does not constitute a burden on interstate commerce contrary to the Federal Constitution.

The petitioner seeks to destroy the effect of the holding in General Railway Signal Co. v. Virginia, supra, by contending: (1) That Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127, has been overruled and that Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617, St. Louis & S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. Ed. 265, and Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. Ed. 176, which were cited by the court to sustain the decision in the General Railway Signal Company Case "are not in point"; (2) that General Railway Signal Co. v. Virginia, supra, has been virtually overruled

by Cudahy Packing Co. v. Hinkle, 278 U. S. 460, 73 L. Ed. 454, decided February 18, 1929, in which the opinion of the court was also delivered by Mr. Justice McReynolds. The petitioner in its brief states that if the *General Railway Signal Co. Case* "were again to come before the Supreme Court, in view of *Cudahy Packing Co.* v. *Hinkle, supra,* this court would decide that the statutes there in question belonged to the unconstitutional side of the border line,—(referred to in the opinion in *General Railway Signal Co.* v. *Virginia, supra*). The statutes involved (in *Cudahy Packing Co.* v. *Hinkle, supra*) closely parallel the Virginia statutes except the filing fees and *annual license fees* are the same for *foreign domesticated* as for *domestic* corporations and are embraced in the same statute". (Latter in italics and in parenthesis ours.) These two propositions will be considered in the inverse order of that above stated.

As every case of this nature must be viewed from the standpoint of the statutes involved and of the facts upon which it is based, the Cudahy Packing Co. Case will be considered in both of these particulars. This case was before the Supreme Court of the United States on an appeal from the order of the Federal District Court sustaining a motion to dismiss for want of equity a bill brought by the Cudahy Packing Company, a Maine corporation, [fol. 157] to enjoin the enforcement of the statutes of Washington, requiring of corporations *the payment of certain amounts of money,* quoted in the statutes *the one "a filing fee" and the other "an annual license fee",* complaint being made that the *statutes* imposing such fees deprived the plaintiff of property without due process of law and denied to it the equal protection of the law and violated the commerce clause of the Constitution. The facts stated in the bill are set out more fully in the opinion of the District Court in Cudahy Packing Co. v. Hinkle, 24 F. (2d) 124, than in the opinion of the Supreme Court of the United States and resort has been had to the opinion of the lower court and to the statutes of Washington in order to arrive at a true understanding of the case, which otherwise *might* be misleading when applied to the case now under consideration. In the bill, (the allegations of which were admitted by the motion to dismiss for want of equity) it was alleged that the *plaintiff about* 1888 *engaged in business in the state of Washington,* and *had since* been engaged

therein in interstate and foreign commerce, and had been actively engaged in interstate commerce between each and every one of the states and in foreign commerce; that its principal office was in the City of Portland, Maine, and that for the purpose of facilitating the transaction of its interstate business it had established agencies in all of the states of the Union; that in the state of Washington its only agency was a warehouse and sales office; that its only property in said state was a lease of a warehouse and refrigeration system and fixtures therein which were of a total value of about $40,000.00; that none of its traveling salesmen took orders for goods save such as the plaintiff shipped into the state direct to the purchaser or to its warehouse for the purpose of filling orders therefor; that its goods warehoused in Washington consisted in most part of original and unbroken packages in *foreign commerce; that its intrastate and interstate commerce were so inextricably interwoven that they could not be separated;* that of its goods sold in the year ending in October, 1926, less than 6/10 of 1 per cent of its entire business was done in the state of Washington, (in round numbers), its goods sold for such year being in excess of $231,000,000.00 and its Washington sales less than $1,325,000.00, and that more than one-half of its sales made in the state of Washington and more than one-half of its merchandise handled in the branch office in Washington were interstate and foreign commerce; that less than 4/10 of 1 per cent of its wages and salaries paid were earned in the state of Washington, such amount being a little less than $67,000.00; that subsequent to 1919 the plaintiff increased its capital stock from $35,-
[fol. 158] 000,000.00 to $45,000,000.00, of which authorized capital stock, but $29,800,000.00 had been issued and that all of its property did not exceed in value the amount of its capital stock issued; that the supplemental articles evidencing such increase had not been filed with the Secretary of State of Washington; *that until the law of* 1925, presently to be mentioned, *no law of the state required the filing of a certificate of increase or decrease of capital stock;* that in 1926 the plaintiff tendered to the secretary of state, for filing, its certificate of increase of capital stock, together with a filing fee of $10.00, which was refused, the Secretary of State demanding $580.00, less $35.00 in fees already paid; that the plaintiff had many traveling salesmen in the

state of Washington and scores of other employees therein; that the plaintiff upon refusing to pay the filing fee demanded by the secretary of state was informed by the secretary of state and state treasurer of Washington that, unless paid, they would request the attorney general to institute a civil action to prosecute the agents of the plaintiff carrying on business in the state and that such suits were about to be brought; that the prosecution of such agents would ruin the plaintiff's business in the state; that in 1927 the plaintiff again tendered to the secretary of state and state treasurer $15.00 and demanded a license to do business in the state of Washington, but that these officers, acting under chapter 149 of the laws of the state of Washington, of the Extraordinary Session of 1925 (Laws of Washington 1925, p. 417), which will presently be mentioned, refused such license unless the plaintiff *paid for filing its certificate of increase* a fee of $545.00, *and also the annual license* fee required by section 3837 of Remington's Comp. Stat. as amended by said chapter 149; that upon *refusal of plaintiff to pay the annual license fee,* said state officers informed the plaintiff that *unless the same was paid,* a license to do business in Washington for the year commencing July 1, 1927, and subsequent years would be refused by the secretary of state and he would strike the plaintiff's name from the records of his office and enter a notation of its dissolution as a corporation; that such state officers further informed the plaintiff that it would be deprived on and after the first day of July, 1927, of the right to maintain any suit in any court in the state of Washington and would be under a presumption of insolvency and under a constant threat of receivership and the danger of loss of its name to some other corporation thereafter organized; that such state officers had notified the State Board of Tax Commissioners of the delinquency of the plaintiff and said board, through the attorney general, [fol. 159] was threatening to enforce *the payment of such license fee;* that the secretary of state had informed it that he was about to forfeit on his books the right of the plaintiff to do business in the state and to advise plaintiff's debtors and those having claims against it of that fact and was about to issue a certificate to that effect to such persons and that the attorney general was threatening to institute suit against the plaintiff for penalties of *non-payment of*

its license tax, or oust it from doing business in the state of Washington and to commence actions against all of its agents in the state, and that this would *deprive plaintiff of its right to do interstate business and business incidental thereto in the state of Washington.* At the time the foreign corporation in question began to do business in Washington and until the enactment of a statute in 1907 (L. Washington 1907, p. 270) a foreign corporation was authorized generally to do business in Washington upon filing a copy of its charter and appointing an agent for the service of process and paying only nominal fees therefor (Remington's & Ballinger's Annotated Code of Washington, sections 3723-3728). No charge for recording any such documents was to be made unless it exceeded a certain prescribed length. In 1916, when the authorized capital stock of the corporation was $20,000,000.00, the articles of incorporation were duly filed with the Secretary of State. At such time and until 1923 a foreign corporation doing business in the state was required only to file a certified copy of its charter in the office of the secretary of state and to appoint an agent for the service of process. The fee for filing such articles of incorporation was $25.00, and that for filing the appointment of the agent was $5.00, and the corporation was required to pay an annual license fee of $15.00. Subsequently and prior to 1926 the plaintiff increased its capital stock to $45,000,000.00, of which but $29,800,000.00 was issued. All of its property at the time of the filing of the bill of complaint in 1927 did not exceed in value the amount of the capital stock issued. The supplemental articles evidencing such increase of capital stock had never been filed with the secretary of state of Washington until the passage of said act in 1925. By Laws of Washington 1923, chapter 144, p. 462, section 3836, of Remington's Comp. Stat. was amended so as to require domestic and foreign corporations, required by law to file copies of their articles of incorporation in the office of the secretary of state, to pay certain fees in proportion to the amount of their authorized capital stock which did not vary in direct proportion to capital stock, *but no maximum fee was fixed;* section 3837 was amended so as to provide that [fol. 160] domestic and foreign corporations *desiring* to file amendatory or supplemental articles increasing their capital stock should pay to the secretary of state the fees

prescribed in the preceding section for the increase of the capital stock of the corporation less the amount already paid for filing the original articles of incorporation or original articles and amendatory or supplemental articles, and such fees did not vary in direct proportion to its capital stock, but no maximum fee was fixed; section 3838 of said compiled statutes was amended so as to provide that the fee for filing the appointment of an agent should be $10.00; and section 3841 of said Compiled Statutes was amended so as to provide that every domestic corporation and every foreign corporation having its articles of incorporation on file in the office of the secretary of state *should* on or before the first day of July of each year pay a license fee in proportion to its authorized capital stock, such license fee being the same as that provided for by said section 3836 as so amended and not varying in direct proportion to capital stock and having no fixed maximum. Sections 1 and 2 of chapter 149 of the Laws of Washington, Extraordinary Session of 1925 (Laws Washington 1925, p. 617), amended sections 3836 and 3837 of Rem. Comp. Stat., as amended by Laws Washington 1923, p. 462, so as to read:

"Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory in the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows: Capital not exceeding $50,000, fee $25; capital of more than $50,000, and less than $100,000, fee $40; capital of $100,000, or more, and less than $150,000, fee $75; capital of $150,000, or more, and less than $200,000, fee $100; capital of $200,000, or more, and less than $300,000, fee $150; capital of $300,000, or more, and less than $400,000, fee $200; capital of $400,000, or more, and less than $500,000, fee $250; capital of $500,000, or more, and less than $1,000,000, fee $500; capital of $1,000,000, or more, and less than $2,000,000, fee $750; and $10 additional for each $1,000,000, or major fraction thereof, of capital stock in excess of $2,000,000: *Provided, however,* That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000."

"Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles

[fol. 161] amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificate of decrease of capital stock, shall pay to the secretary of state a filing fee of $25. For filing of other amendatory or supplemental articles, it shall pay a fee of $10; *Provided, however,* That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000, plus $10 for each separate instrument filed in addition to its original articles of incorporation."

Chapter 147 of the laws of the Extraordinary session (Laws of 1925, p. 410) amended section 3853 of Remington's Comp. Stat. so as to provide that every foreign corporation doing business in the state *should* cause to be filed in the office of the secretary of state a certified copy of its charter or articles of incorporation and a certified copy of each and all of its certificates of increase of its capital stock. *Until the enactment of such last mentioned statute in* 1925, *no law of the state of Washington required the filing by a foreign corporation of any amendment to its charter increasing its authorized capital stock or a certificate of increase or decrease of capital stock.* The fee for filing the amendment to its articles of incorporation increasing its authorized capital stock or the certificate of increase required to be filed by section 3853 of Remington's Comp. Stat. was determined in the manner prescribed in section 3837 of Remington's Comp. Stat. as amended by Laws of Washington 1925 and which has heretofore been quoted. Mr. Justice McReynolds, delivering the opinion of the court, said:

"Appellant is incorporated under the laws of Maine. Its authorized capital stock is $45,000.000. Less than $30,000,000 has been issued and the total value of the corporate

property does not exceed that sum. It does an extensive business in meats and foodstuffs throughout the Union and abroad. During 1916, when the capital stock was $20,000,000, the articles of incorporation were duly filed with [fol. 162] the proper state officer *and the corporation began to carry on closely associated interstate and intrastate business in Washington.* Its property therein is now worth $40,000. Gross sales by the corporation for the year ended October 31, 1926, were $231,750,000. Of these $1,313,275, were made in Washington, less than half being intrastate.

"The statutory provisions here important appear in the sections of Remington's Compiled Statutes of Washington mentioned below. * * * Filing fees because of the increased capital and license taxes for 1927, both reckoned upon the authorized capital stock, were demanded of appellant. Penalties for failure to comply were threatened. By an original bill in the United States District Court, western district of Washington, it set up the above-stated facts and asked an appropriate injunction to prevent enforcement of the demands. A court of three judges heard the cause, denied a preliminary injunction, and dismissed the bill for want of equity. Looney v. Crane Co., 245 U. S. 178, 187, 62 L. Ed. 230, 235, examined Texas statutes which required foreign corporations to pay permit *and franchise taxes* graduated according to authorized capital stock and declared them in conflict with the Federal Constitution because they imposed 'direct burdens on interstate commerce, and, moreover, exerted the taxing authority of the state over property and rights which were wholly beyond the confines of the state, and not subject to its jurisdiction, and therefore constituted a taking without due process'. These statutes prescribed no maximum tax. *In other respects they were not unlike the acts here under consideration.*

"Unless saved by the $3,000.00 limitation, the Washington enactments are subject to the constitutional objections pointed out in Looney v. Crane Co., and must be denied effect. Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127, upheld a *tax* based upon authorized capital stock but limited to $2,000 imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the cir-

cumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the state was not taxed.

"In Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218, 69 L. Ed. 916, 924, we said:

" 'It must now be regarded as settled that a state may [fol. 163] not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the 14th Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 87, 58 L. Ed. 127, 134, tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved' Baltic Min. Co. v. Massachusetts had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the state may be sustained if relatively small. This view did not harmonize with the principles approved by Looney v. Crane Co., and was expressly disapproved by Alpha Portland Cement Co. v. Massachusetts. It follows that the decree of the court below is erroneous and must be reversed. Whether, because reckoned upon authorized and not upon actual capital stock, the challened legislation fails to require like fees for equal privileges within the doctrine of Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. Ed. 169, we need not now consider." (Italics ours.)

There is nothing in the opinion of Mr. Justice McReynolds to indicate that if the Washington statutes had been the same as the Virginia statute, and had only imposed an entrance fee upon a foreign corporation seeking to do intrastate business in Washington, separate and distinct from its interstate business, he would have held such a statute invalid as an interference with interstate commerce or with the due process clause of the Federal Constitution. Although the General Railway Signal Company Case was cited in the briefs of counsel for the appellee (73 L. Ed., p. 456) and was commented upon by Mr. Justice Brandeis in his dissenting opinion, where he said:

"The General Ry. Signal Company Case was decided by an unanimous court, and the correctness of the decision has never been questioned,"

it was not referred to by Mr. Justice McReynolds, presumably for the reason that the statutes involved in the General Ry. Signal Company Case were entirely different from the Washington statutes which involved two *interdependent* statutes, *one* of which imposed a filing fee or entrance [fol. 164] fee and *the other* imposed an annual franchise tax and that he did not regard the Washington statutes similar to the Virginia statutes involved in the General Ry. Signal Company Case. The fact that the statutes were interdependent was plain from the character of the subject matter and the mode in which it was dealt with, and the construction placed by the secretary of state upon the statutes when he refused a license, unless the corporation paid the fee for filing its certificate of increase of capital stock *and the annual license fee.* In the Cudahy Packing Company Case the foreign corporation had begun to do business in the state *before any filing fee or annual franchise fee was imposed.* It had built up an *intrastate and interstate business* which were alleged in the bill of complaint and admitted by the motion to dismiss the bill for want of equity to be so *inextricably interwoven that they could not be separated.* The *filing* fee and the *annual franchise fee* imposed by the Act of 1925 were required to be paid as a condition of the foreign corporation *continuing* to do business in the state. In the General Railway Signal Company Case the facts clearly showed local business separate and distinct from interstate commerce and the same is true in the case now under consideration. The annual *franchise tax* imposed by the Washington statutes and the interdependent filing fee plainly constituted a burden upon the interstate business of the corporation which was so *inextricably interwoven* with its intrastate business that they could not be separated, and the franchise tax, which was in every sense a tax and not an entrance fee *required for the issuance of a permit or certificate of authority to do intrastate business,* plainly operated as a tax upon business and property out of the state and thereby deprived the corporation of property without due process of law, even though there was a maximum fee prescribed

in each instance. As stated in the opinion of the Supreme Court, the Washington statutes were similar to the Texas statutes involved in Looney v. Crane Co., 245 U. S. 178, 62 L. Ed. 230, (except as to the matter of maximum limitation) in that they required foreign corporations to pay *permit and franchise taxes* graduated according to authorized capital stock and which imposed *direct burdens* on interstate commerce and exerted the taxing power of the state over property and rights which were *wholly beyond the confines of the state and not subject to its jurisdiction* and, therefore, constituted a taking without due process. The Washington statutes being objectionable on that score could not be saved merely because the amount which could be demanded was limited to $3,000.00, *for the amount* [fol. 165] *demanded is unimported when there is no legitimate basis for the tax, and* the Supreme Court properly held that, if Baltic Min. Co. v. Massachusetts, was regarded as lending support to the theory that *a tax* which *really burdens* interstate commerce and *reaches property beyond the state* may be sustained if relatively small, such view did not harmonize with the later principles laid down by the court.

It is to be specially noted that the parts of the Washington statutes imposing the *filing fee and the annual franchise tax* were so connected with and dependent upon each other that they *could not be separated,* if effect was to be given to the legislative intent.

It is well settled that if a statute is in part unconstitutional the whole statute must be deemed invalid if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or if so enforced will not effectuate the manifest intent of the legislature. (Allen v. Louisiana, 103 U. S. 80, 84, 26 L. Ed. 318, 319.) The Washington statute imposing the filing fee and the franchise tax being interdependent, the unconstitutionality of the statute imposing the franchise taxes would invalidate the other, and, therefore, the Supreme Court in Cudahy Packing Co. v. Hinkle, supra, properly held that both of such statutes were void and that the court erred in dismissing the bill for want of equity. An entirely different situation is presented in the case now under consideration, where the facts and statutes involved are

entirely different from those involved in the Cudahy Packing Company Case.

Looney v. Crane, 245 U. S. 178, 187, 62 L. Ed. 230, was relied upon by the court in Cudahy Packing Co. v. Hinkle, in holding the Washington statutes unconstitutional. It was cited in the opinion in the General Railway Signal Company Case, as illustrative of the statement that that case was "on the border line", and it is also relied upon by the petitioner in support of its contention that the statutory enactments in Virginia imposing the entrance fee and the additional entrance fee upon a foreign corporation as a condition of securing a certificate of authority to do local business and of the continuance of the right to do such business in the state are unconstitutional. The Texas statutes involved in Looney v. Crane were similar to those of Washington save that they prescribed no maximum initial fee or annual franchise tax. The following facts are derived from the opinion of the Supreme Court of the United States, and that of the District Court in Crane Co. v. Looney, 218 Fed. 260, which was reversed by the Federal Supreme Court. The Crane Company was an Illinois corporation, [fol. 166] chartered in 1865 to engage in the business of manufacturing, buying, selling, and otherwise dealing in hardware, builders' supplies and materials, and agricultural machinery and supplies. Its domicile and principal office was in Chicago. It carried on its chartered business not only in Illinois, but in other states, including Texas, by the shipment of merchandise on orders obtained through the solicitation of its agents and sent to Chicago for execution, or orders sent to Chicago through the mail. Prior to 1894 it entered the state of Texas with its goods, wares and merchandise, selling them through travelling salesmen, who took orders therefor, and sent them to Chicago for acceptance and filing through shipments, and it received, accepted and filled orders sent it through the mails from merchants living in Texas. Since it so entered the state and up to the time of the filing in 1914 of the bill to enjoin the collection of the charges complained of it had been engaged in interstate commerce between Texas and the other states of the Union. In order that it might more conveniently serve those with whom it did business, it established agencies in other states to which goods were shipped from Chicago or from other points where they were brought and

shipment directed, from which agencies such goods were sold and delivered either in the original or broken packages, as was most convenient. Such agencies also became supply depots from which interstate commerce was carried on by filling orders received from other states. Such an agency was established in Dallas, Texas, in 1904. In the year 1905, the company applied for and received from the state of Texas a permit to do business in the state for the succeeding ten years and during the time intervening between the year 1906 and the time of the filing of such bill, for the purpose of facilitating the carrying on of its business by all the methods stated, it had acquired real estate at Dallas, Texas, and built a depot or warehouse thereon and also had a warehouse at another place in Texas. In 1889 Texas enacted a statute (Acts Texas 1889, p. 87) relating to foreign corporations, which not only compelled the filing by a foreign corporation of a copy of its charter, but exacted for the permit to do business a minimum charge of $25.00, based upon $100,000.00 of capital stock and an increased amount predicated upon capital stock until the exaction amounted to $200.00, *which was the limit,* and the permit which was authorized to be issued by the secretary of state was limited to ten years duration. As early as 1893 a statute was enacted imposing what was denominated as *a franchise tax* and providing that every domestic corporation and foreign corporation having a permit *should* [fol. 167] *pay $10.00 a year.* (Acts Texas 1893, p. 158.) In 1897 this *franchise tax* was modified (Acts Texas 1897, p. 168); as to domestic corporations, while retaining the minimum charge of $10.00 the maximum was raised to $50.00 and as to *foreign corporations* the *minimum* was raised from $10.00 to $25.00 and the *maximum limit was removed by fixing percentages of charges upon the capital stock increasing without limitation.* This *franchise tax* was preserved with some increases in the bases upon which it was to be calculated *until* 1907, when it was enacted both as to domestic and foreign corporations that in case the capital stock of the corporation *"issued and outstanding plus its surplus and undivided profits shall exceed its authorized capital stock"*, the *franchise tax* shall be *calculated* upon the aggregate of both authorized capital stock and such surplus and undivided profits, thereby increasing to that extent the levy. (Acts Texas 1907, p. 503.) In 1907

there was also enacted a law increasing the amount of the permit tax, (Acts Texas 1907, S. S., p. 500). The standard for the levy of that tax—the authorized capital stock—was retained, *but the maximum limit,* which was $200.00 for ten years under the previous law, *was removed, and the percentages of levy on the authorized capital stock* were so augmented that the permit for which the company paid to the Secretary of State $200.00 for ten years in 1905, would, under the new law, have required the company to pay, in order to do business in the state, the sum of $17,040.00. From 1904 down to and including 1914, the company paid the yearly franchise tax, the amount increasing from $480.00 in 1904 to $1,948.00 in 1914, the increase presumably resulting from the increase of rate of such tax by the legislation above indicated and from the fact that, by the amendment of 1907, *the surplus and undivided profits* of the company *became susceptible of being taken into view in addition to its authorized capital stock. Shortly before its existing permit,* taken out in 1905, *expired,* the company brought suit to enjoin the enforcement of the statutes imposing the permit tax and the franchise tax on the ground that both were repugnant (a) to the commerce clause of the Federal Constitution because imposing a direct burden on interstate commerce; (b) to the due process clause of the 14th amendment because constituting a taking of property, and (c) to the equal protection clause of the 14th Amendment based upon what were urged to be discriminatory provisions in the acts. Immediately prior to the institution of such suit the authorized capital stock was $17,000,000.00, which was issued and paid up, and the surplus and undivided profits of the company amounted to $8,129,000.00. [fol. 168] The total assessed value in Texas of its real estate, money there employed, and merchandise there held, amounted to $301,179.00. The company's gross receipts and gross sales *in all the states* for the year 1913 amounted to $39,831,000.00, of which only $1,019,750.00 had any relation to the State of Texas and *nearly one-half of this amount was the result of transactions purely of an interstate commerce character,* arising from the sale and shipment of goods from other States to purchasers in Texas who ordered them and from shipments from Texas to other States for the purpose of filling orders sent from such States. The company was assessed and paid taxes as other tax-

payers on its real estate, its money on hand in Texas, and its stock in trade in that state. The Supreme Court of Texas, following the decision in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, had held the Permit Tax Law of 1907 repugnant to the Federal Constitution and enjoined its enforcement. Mr. Chief Justice White, delivering the opinion of the court in Looney v. Crane, supra, after stating that it was unnecessary to consider the contention of the equal protection of the laws, disposed of the two other contentions, that is, the direct burden on interstate commerce and the want of due process, saying:

"It may not be doubted that *under the case stated intrinsically and inherently considered, both the permit tax and the tax denominated as a franchise tax* were *direct burdens on interstate commerce,* and moreover, *exerted the taxing authority* of the State *over property and rights* which were *wholly beyond the confines of the State,* and not subject to its jurisdiction, *and* therefore *constituted a taking without due process.* It is also clear, however, that *both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed; that is, the authority to control the doing of business within the State by a foreign corporation* and the right to tax the intrastate business of such corporation, carried on as the result of permission to come in. * * * Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State, in violation of the Constitution, or, because of the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State, in disregard, not only of the commerce clause, but of the due process clause of the 14th Amendment. Western U. Teleg. Co. v. Kansas, 216 U. S. 1, [fol. 169] 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. Ed. 378; Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. Ed. 423; International Textbook Co v. Pigg, 217 U. S. 91, 54 L. Ed. 678. * * * But, despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented, and the effect given to them in Texas as to one of the statutes here

involved, *it is now insisted that the statutes are not repugnant to the Constitution of the United Sates,* and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 59 L. Ed. 265; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. Ed. 176. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but, on the contrary, in explicit terms declared that they did not conflict with them, and that they proceeded upon conditions peculiar to the particular cases. * * * In the first place, *it is apparent in each of the cases that, as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution,* it came to be considered whether, by their necessary operation and effect, they were repugnant to the Constitution in the particulars stated, and this inquiry, it was expressly pointed out, was to be governed by the rule * * * that 'the substance, and not the shadow, determines the validity of the exercise of the power'. In the second place, in making the injuiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that, because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would [fol. 170] arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution. It follows, therefore, that the cases which

the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provisions in each particular case, which, it was held, caused the general and recognized rule not to be applicable. Some suggestion is made in argument of the possibility of treating the franchise tax as not repugnant to the Constitution, although that result be necessarily reached as to the permit tax. But we are of opinion that the proposition is without merit, *as the interdependence of the two provisions obviously results from the character of the subjects with which they deal and the mode in which the statutes deal with them.* Indeed, that conclusion would seem to necessarily follow from the legislative history of both and *the concordant nature* of their development."

An analysis of Looney v. Crane, supra, discloses several important facts: (1) The statutes involved imposed a *permit tax* upon corporations which had *already received* a permit to do business in the State (when the fee was limited to $200) which was based on the authorized capital stock of the corporation, but contained no maximum limit, as a result of which the Crane Company (which had in 1905 secured a permit to do business in the State and since that time had acquired property and had built up a large interstate and intrastate business in the State) would in 1914 have had to pay in order to *continue* to do business in the State for another period of ten years the sum of $17,040, and *also* imposed *an annual franchise tax,* which, though fixed on percentages of the authorized capital stock, increasing without limitation when the company secured in 1905 a permit to do business in the State, *was,* by virtue of the statute enacted *in 1907, thereafter* to be calculated not only on the amount of the maximum authorized capital stock, *but also in case the capital stock of the corporation issued and outstanding, plus its surplus and undivided profits,* should exceed its authorized capital stock *upon the aggregate of the authorized capital stock and the surplus and undivided profits of the corporation.* Clearly the statutes involved in the Texas case were in no wise similar to the Virginia statutes considered in the General Railway

Signal Co. case, or those involved in the case now under consideration which only impose an entrance fee which does not vary in direct proportion to capital stock and fixes a maximum fee and which *do not impose any annual franchise tax upon a foreign corporation;* (2) The permit law [fol. 171] enacted in 1907, though prescribing percentages of levies on the authorized capital stock, did not provide for any maximum fee (which was $200 for the ten years under the previous law with which the Crane Company had complied in 1905) and thus differed from the Virginia statute and from the statute involved in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127, and in Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 638, which followed Baltic Mining Co. v. Massachusetts, and sustained the validity of an *annual* excise or franchise tax which was based upon a given percentage of the authorized capital stock of the corporation, but prescribed a maximum limit on the amount of the tax; (3) The statute of 1907 *imposing the annual franchise tax* and not prescribing any *maximum* limit to the tax clearly imposed a *direct* burden on interstate commerce and exerted the taxing authority of the State over property beyond the confines of the State as it measured the amount of such tax by not only the amount of the authorized capital stock, but in the event that the capital stock of the corporation issued and outstanding, plus the surplus and undivided profits, should exceed its authorized capital stock, by the amount of such authorized capital stock and such surplus and undivided profits, notwithstanding such surplus and undivided profits might have been the result of corporate activities wholly of an interstate character and in no wise the result of any activities, interstate or intrastate in Texas. There is no corresponding provision in the Virginia statutes; (4) The Permit Tax Law and the annual Franchise Tax Law of Texas were interdependent and the invalidity of one necessarily invalidated the other. The statute imposing the permit fee and that imposing the annual franchise tax constituted together a single scheme for the taxation of foreign corporations conducting a local business and considered *together* were held to make the *whole scheme void.* There is no annual franchise tax imposed in Virginia on foreign corporations, and the only annual charge, maximum $25.00, is clearly a service fee, chargeable alike against domestic corporations

and upon exactly the same basis, by a different and absolutely independent statute; (5) The court *did not overrule the Baltic Mining Co. case, supra,* but pointed out the distinction between the statute involved in such case and other analogous cases and those involved in the earlier cases which by their *necessary operation* were repugnant to the Federal Constitution and explained that the Baltic Mining Co. case and other analogous cases in no way sustained the assumption that because a violation of the Constitution was [fol. 172] not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise of the Constitution was violated was treated as affording a measure of the duty of enforcing the Constitution and that such cases rested upon the particular provisions in each particular case, which, it was held, caused the general and recognized rule not to be applied; (6) The facts involved in Looney v. Crane differed materially from those involved in the General Ry. Signal Co. case. In the latter case the corporation was applying for admission to do business in the State and to become a quasi-citizen of the State and entitled to equal privileges with citizens of the State. In the former case *after* the corporation had secured admission to the State additional and heavy burdens were imposed by the *statutes* enacted *after* such admission; (7) The court in Looney v. Crane recognized the right of the State to exert the power of imposing both a permit charge and an annual franchise as a condition of enjoying the right to do local business in the State. Looney v. Crane involved statutes and facts so dissimilar to those involved in the General Railway Signal Co. case, and those under consideration in the case at bar that it cannot be regarded as in any way bearing upon or controlling the issues now involved, but as it is so strongly relied upon by the petitioner in support of its contentions and seems to have been the basis for the decision in Cudahy Packing Co. v. Hinkle, supra, which the petitioner in its brief states "is almost identical with the case now under consideration" (though, as pointed out, the cases are not in any way parallel), the above extended analysis has been made.

In the consideration of both Cudahy Packing Co. v. Hinkle, supra, and Looney v. Crane, supra, upon which the petitioner relies in support of its contention that the Supreme Court of the United States in the consideration of the stat-

utes involved in the case now under consideration will not follow its decision in the General Ry. Signal Co. case, it is to be noted that Looney v. Crane was decided by an unanimous court on December 17, 1917, after having been twice argued, and was referred to in the General Ry. Signal Co. case, which was decided by an unanimous court on April 15, 1918, but not regarded as controlling the question there involved. Mr. Chief Justice White, who delivered the opinion in Looney v. Crane, was a member of the court when the General Ry. Signal Co. case was decided. Mr. Justice McReynolds delivered the opinion in the General Ry. Signal Co. case and in the Cudahy Packing Co. case.

The decision in Looney v. Crane, supra, was based upon Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 [fol. 173] L. Ed. 355; Pullman Co. v. Kansas, 210 U. S. 56, 54 L. Ed. 378, and Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 54 L. Ed. 423, which were decided in 1913. These cases were cited in the brief of the plaintiff in error in the General Railway Signal Co. case in support of the contention that the imposition of a tax upon the entire capital stock of a foreign corporation as a condition of its doing *intrastate business in connection with its interstate business* is repugnant to the Federal Contsitution, and they are also relied upon by the petitioner in support of its contention that the Virginia statutes involved in the case now under consideration are invalid. As heretofore stated, in considering the validity of a statute claimed to interfere with or to impose a direct burden upon interstate commerce or to deprive a foreign corporation of due process of law by taxing property without the State, each case must be decided upon the particular statutory provisions and the particular facts involved.

In Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, it was held that the exaction from a foreign telegraph company of the benefit of the permanent school fund, under the authority of Kan. Gen. Stat. 1901, p. 280, of a charter fee of *a given per cent of its entire authorized capital stock,* as a condition of *continuing* to do local business in the state, was invalid under the commerce and due-process-of-law clauses of the Federal Constitution, as *necessarily* amounting to a burden and tax on the company's interstate business and on its property located or used outside the state. The Act of 1901, known as the

"Bush Act", was the *first* law ever passed by Kansas imposing *any fee or conditions* upon the right of a foreign corporation to do business in that State. It required foreign corporations, seeking permission to engage in business in Kansas, to make an application to the State Charter Board for permission to engage in Kansas as a foreign corporation and to accompany such application with a fee of $25.00, and provided that it should be a condition precedent to obtaining authority to transact business in the State that the corporation should file in the office of the Secretary of State its written consent, irrevocable, that actions might be brought against it in the proper court of any county in the State in which the controversy arose, or in which the plaintiff resided, by service of process on the Secretary of State, and that such service should be valid and binding upon it; that every foreign corporation *then* doing business in the State should within thirty days from the taking effect of the Act file with the Secretary of State the specified written consent; that if the charter board determined that the foreign cor- [fol. 174] poration was duly organized, that its capital was unimpaired and that it was organized for a purpose for which a domestic corporation might be organized in Kansas, then the Board should grant the application and issue a certificate of authority to such foreign corporation to engage in business in the State upon payment to the State Treasurer *for the benefit of the permanent school fund*, of a charter fee of 1/20 of 1% of its *authorized capital stock* upon the first $100,000.00 of *its capital stock, or any part thereof*, and upon the next $400,000.00, or any part thereof, 1/20 of 1%, and for each million or major part thereof over and above the sum of $500,000.00, $200.00; and in addition pay certain filing and recording fees; that *every corporation*, save banking, insurance and railroad corporation, should annually prepare and file with the Secretary of State a complete detailed statement of its financial condition, failure to do which, by a foreign corporation, should work a forfeiture of its right or authority to do business in the State; and that no action should be maintained or recovery be had by any corporation doing business within the State without first procuring the certificate of the Secretary of State that such annual statement had been properly made. The Western Union Tele-

graph Company, a foreign corporation, made application to the Charter Board for permission to engage in business as a foreign corporation, stating that the amount of its capital stock fully paid up in cash was $100,000,000.00, and accompanied such application with a specified fee of $25.00, and also its written consent, irrevocable. The Charter Board granted the application of the Telegraph Company, but by its order to that effect recited "that the application be granted and the applicant authorized and empowered to transact within the said state its business of a telegraph company, providing that said orders should not take effect and that no certificate of authority should be issued to the company until such applicant should have paid to the State Treasurer of Kansas *for the benefit of the permanent school fund the sum of* $20,100.00, *being the charter fee provided by law necessary to be paid* by a foreign corporation having a capital of $100,000,000.00. It is further understood, ordered and provided that nothing herein contained shall be applied to nor be construeed as restricting in any wise the transaction by the said applicant of its interstate business nor its business for the Federal Government, but that this grant of authority as to requirement of payment relate only to the business transacted within the State of Kansas." Such fee of $20,100.00 was the per cent of the *authorized capital stock* of the company which the statute required it to pay before doing, [fol. 175] *or continuing to do,* any *local* business in Kansas. The company refused to pay such fee, and *continued as before* to do local telegraph business of all kinds, thereupon an action was brought by the State of Kansas to restrain the corporation from transacting local business in the State except so far as the company's duties to or contracts with the United States should be affected, and to oust the defendant from the exercise within the State of Kansas of the corporate rights and franchises of receiving, transmitting and delivering telegraph messages and communications and of receiving compensation therefor. The sole ground of the complaint was that in consequence of the failure of the Telegraph Company to pay the charter fee of $20,100.00, it was without authority to *continue* doing any intrastate or local business in Kansas. The reasons given by the company for its refusal to pay the required fee were set forth in its answer, to which a de-

murrer was sustained by the lower court (75 Kans. 609, 90 Pac. 299). The answer set forth that the company had the right to transact both interstate and local business in Kansas without paying the fee of $20,100.00; that by laws passed relative to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the *territory* of Kansas and many since the creation and organization of the State of Kansas; telegraph companies, including the Western Union, *were invited* to come into the State of Kansas and build and construct their lines therein, and to connect said lines with other telegraph lines then or thereafter constructed, *and to do a general telegraph business, both domestic and interstate,* throughout the state of Kansas and to thereby place the citizens of such state wherever the lines reached, in direct telegraphic communication with all parts of the United States; that *in pursuance of such invitation,* and *before* the admission of the state of Kansas to the Union, the Western Union Telegraph Company entered the State of Kansas and extended its lines to all points where the same might be needed and subsequent to the admission of the State, by construction and purchase, lines of the Telegraph Company were extended to all parts of Kansas, and between eight hundred and nine hundred offices established for the use and convenience of the public; that there *had been expended* by the defendant *at the time of the enactment of the so-called Bush Act* many thousands of dollars in the construction of lines and wires and in the appurtenances of the telegraphic business and in the establishment of offices; that all of this money was expended in full faith and confidence in the laws already *enacted by the State of Kansas* for the furtherance and encouragement of [fol. 176] telegraphic business, and also in the full faith that said company would have equal protection of the laws of the State of Kansas, and the fair, equitable, and equal treatment required by the Constitution of the State of Kansas in the matter of taxes and other public charges imposed upon it; that the enforcement of the Kansas statutes would seriously affect and cripple the company's officiency *as an instrument of interstate commerce* and as an agency of the government for transacting both interstate and domestic business in that State, because the *receipts* derived from interstate and governmental business alone would, *in*

many offices in Kansas, not be equal to the expense of keeping such offices open, and that the closing of them on that account would be detrimental to the governmental service, as well as to interstate commerce; that the Charter Board required and was attempting to exact from the Telegraph Company a charter fee based upon the defendant's *entire capitalization,* to-wit: $100,000,000.00, which $100,000,000.00 *represented the property and lines of telegraph of the defendant company in the forty-five states of the American Union, in Canada, and lines under the Atlantic and Pacific oceans and in foreign countries;* that such tax was upon property and rights outside of Kansas, and therefore, *beyond its jurisdiction for the purpose of taxation;* and that the statute in question so far as it *prevented* the company from *using its property* in the State for *all* purposes of its business would operate as a taking of such property without due process of law, and that the statute was in contravention of the commerce clause of the Federal Constitution. Mr. Justice Harlan, delivering the opinion of the court, said:

"If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. * * * Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, *of a given per cent of its authorized capital,* representing, as that capital clearly does, *all* of its business and property, both within and *outside of the State, a condition* of its right to do local business in Kansas, is, in its essence, *not simply* a *tax* for the privilege of doing *local business* in the State, but *a burden and tax* on the company's interstate business and on its property located or used outside of the State. The express words of the [fol. 177] statute leave no doubt as to what is the *basis* on which the fee specified in the State statute rests. That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is *a given per cent of the company's authorized capital; that is, all its capital,* wherever or however employed, whether in the United States

or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that State. *It strikes at the company's entire business, wherever conducted, and its property, wherever located,* and, in terms, makes it a *condition* of the company's telegraph right to transact purely local business in Kansas that it shall contribute, for the benefit of the State school fund, *a given per cent of its whole authorized capital,* representing all of its property and all its business and interests everywhere. * * * But as already said, *what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare.* It has seen proper to *exact a specified per cent of the authorized capital* of the telegraph company, representing, necessarily, *all its business,* interstate and intrastate, and all its property interests in and out of the State. *It is important here to observe*—indeed, the contrary could not be asserted—that the telegraph company *lawfully entered Kansas,* with the consent of both the *territory and State,* for the purposes of its business *of every kind, long before,* and was legally there *when, the Bush Act was passed.* The State concedes its right to *continue* in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded; and only because of such refusal it seeks the aid of the court to oust the company from the State, so far as *local* business is concerned, unless it shall, by paying such fee, *contribute*—that is the proper word—a given per cent of all its capital for the support of the schools of the State. The State knows that the telegraph company, *in order to accommodate the general public and make its telegraphic system effective,* must do *all kinds of telegraphic business.* Yet, it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas *being taxed in order that it may continue to conduct a business concededly beneficial to the public*—a right *lawfully* acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the State *for many years after* Kansas was admitted as a State of the Union. But it is said to be well settled that a State, in the exercise of its reserved [fol. 178] powers, may prescribe the *terms* on which a

foreign corporation, whatever the nature of its business, may enter and do business within its limits. It is true that, in many cases, the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporation from its limits, or impose such terms and conditions on their doing business in the State as, in its judgment, may be consistent with the interests of the people. *But those were cases in which the particular foreign corporation before the court* was *engaged in ordinary business,* and not *directly or regularly in interstate or foreign commerce.* * * * We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay in the State school fund a given per cent of its authorized capital representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a percent of its capital stock a 'fee' for the privilege of doing local business To hold otherwise, is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisons of this court nullified, and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by *taxation* upon property situated beyond its limits. We cannot fail to recognize the *intimate connection* which, at this day, exists *between the interstate business done by interstate companies and the local business* which, for the convenience of the people, *must* be done, or can generally be better and more economically done, by such *interstate* companies rather than by domestic companies organized to conduct only local business. * * * It is firmly established that, consistently with the due-process clause of the Constitution of the United States, a State cannot *tax* property located or existing permanently beyond its limits. * * * —the statute of Kansas forbids the doing of

local business within its limits by a corporation of another State or foreign country, *except* subject to the condition that *such corporation* first *pay* to the State *a given per cent of its entire capitalization* representing the value of *all* its business, property, and interests *within and without the State*, thereby placing a direct burden on the privilege [fol. 179] or franchise of transacting interstate commerce and taxing property rights, beyond the jurisdiction of the State for purposes of taxation. That the Western Union Telegraph Company is engaged in both interstate and intrastate commerce is no reason, in itself, why Kansas may not, in good faith, require it to pay a license *tax* strictly on account of local business done by it in that State. But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall *first* pay to the State a given per cent of *all* its capital stock, representing all of its property, wherever situated, and all its business in and outside of the State. * * * In the present case, the State of Kansas demands, in the form of a fee, a given per cent of all the capital of the foreign corporation, without any discrimination between the capital representing the business and property of the telegraph company outside of the State and the capital representing such of its business and property as are wholly local to the State. And it seeks the aid of the court to oust the telegraph company from *continuing to do business in the State, so far as local business is concerned*, because, and only because, it will not surrender its immunity from State taxation in reference to its interstate business and its property outside of Kansas. * * * The right of the telegraph company *to continue the transaction of local business* in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from State taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution." (Italics ours.)

Mr. Justice White, concurring in the judgment of the court, said:

"It is shown that the telegraph company, *many years ago*, went into the State of Kansas, constructed its lines, established its offices, etc., and has *since* been engaged in business, *both* interstate and local. It is not disputed that there was *no law* in the State forbidding the company from doing as it did. From this it results that the corporation went into the State, constructed its plant, and carried on its business, *on the implied invitation*, or, at least, with the tacit consent, of the State. *No one questions that the tax* which [fol. 180] is here in dispute, *imposed* by the law of Kansas upon the corporation, is *repugnant to the Constitution of the* United States *because wanting in due process, and that it is therefore confiscatory in character.* The *tax* being thus conceded to be *inherently vicious*, there is, of course, no attempt to sustain its validity on its intrinsic merits. * * * *this cause is concerned not with the power of the State to prevent a corporation from coming in for the purpose of doing local business*, and to attach conditions to the privilege of so coming in, *but involves* the right of the State to *confiscate* the property of the corporation *already within the State, and which has been there for years, devoted to the doing of local business, as the result of the implied invitation or tacit consent of the State*, arising from its failure to forbid or to regulate the coming in. In other words, *this case involves determining, not how far a State may arbitrarily exclude*, but to what extent, *after allowing a corporation to come in and acquire property*, a State may take its property within the State *without compensation*, upon the theory that the corporation is *not* in the State, and has no property right therein which is not subject to confiscation. * * * The telegraph company has expended in the State large sums of money, adequate for the purpose of enabling it to do *both* local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the *local* business. The *continued* beneficial existence of the investment depends upon the right *to use the property* for the purpose for which it was acquired; that is, *for both interstate and local business.* The State law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition

that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the State. It has been invested therein for the very purpose *of doing local as well as other business.* If the unconstitutional burden be not assumed, *local business must cease,* and hence the property established for the purpose of doing the local business becomes *worthless* and is in effect *confiscated.* If, on the other hand, the unconstitutional burden be borne, a like result takes place. * * * I cannot assent to the correctness of the contention in so far as it asserts that the State may suffer a corporation *to come into the borders, invest* in property therein, and then, *after* having allowed, by acquiescence or implied invitation, such a situation to arise, the State may treat the corporation as if it had never come in and its property within the State as if it were wholly out of the State, and despoil the corporation of its rights and prop- [fol. 181] erty upon such false assumption. It is to be observed that the view taken by me does not deprive the State of power to exert its authority over the corporation and its property in the amplest way, subject to constitutional limitations. It simply *prevents the State from driving out* the corporation *which is in the State* by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, *except upon the assumption that the corporation is not in the State,* and that the illegal exactions are the price of the privilege *of allowing it to come in.*" (Italics ours.)

The case of Western U. Teleg. Co. v. Kansas, supra, was based upon a statute and upon facts entirely different from those involved in the General Railway Signal Co. case, and in the case now under consideration. The fee imposed by the Kansas statute was held to be a *tax.* The statute was made applicable to corporations already engaged in business in Kansas, and it was shown that prior to the passage of such statute the corporation had gone into Kansas and been engaged in business, both interstate and local, (which interstate and intrastate business were necessarily conducted together and commingled, the same agencies and instrumentalities being used in the conduct of both), and had expended in the State large sums of money adequate for the purpose of enabling it to do both local and interstate business, and that the investment in Kansas and its

magnitude were in part a resultant of the requirements of the *local business* and that the continued beneficial existence of the investment *depended* upon the right to use the property for the purpose for which it was acquired—that is, for both interstate and local business—, and that the Kansas statute took the property, or what was equivalent thereto, imposed an unconstitutional and confiscatory burden, upon condition that such burden be discharged or the local business be abandoned. The Virginia statutes, involved in the case under consideration, require a foreign corporation *before* doing a local business in the State to procure a certificate of authority from the State Corporation Commission and pay an entrance fee, the nature of which differs entirely from the statute involved in the Western Union case and which is not a given percentage of its authorized capital stock and which does not vary in direct proportion to the authorized capital stock of the corporation and has a fixed maximum, and they do not contemplate, as did the Kansas statute, the payment of a fee as a condition of the right of a foreign corporation, which [fol. 182] at the time of the passage of the act had already been engaged in the transaction of interstate and local business in the State, which was inseparably interwoven and commingled, and had invested in property in the State which necessarily was used for the carrying on jointly of interstate and intrastate business, to *continue* such local business and use its property within the State in the carrying on of such local business. In addition the Virginia statutes do not and cannot, in view of section 163 of the Constitution of 1902, apply to an instrumentality of interstate commerce; that is, an interstate commerce carrier, as the Western Union Telegraph Company was.

Pullman Co. v. Kansas, 216 U. S. 56, 54 L. Ed. 378, involved the same statute as that considered in Western U. Teleg. Co. v. Kansas, supra. The State of Kansas filed a quo warranto proceeding, praying that the foreign corporation be required to show by what authority it exercised within Kansas the corporate right and power of charging compensation for the use of reserved seats in its cars by day and and sleeping berth during the night and serving meals in its dining car within the State of Kansas, such services it was alleged being rendered to and State fees being collected from passengers transferring upon railroads from places within the State, and that it be adjudged

that the defendant had no authority of law for the performance of such corporate acts, powers, franchises and business in the State of Kansas and and be ousted of and from the exercise within the State of such corporate rights and franchises and receivnig compensation therefor. The business of the Pullman Company under its charter was that of furnishing sleeping, parlor and tourists cars on railroads, the company reserving to itself the right to charge a certain price for the use of reserved seats on such cars during the day time and sleeping berths during the night. Such business extended throughout the United States where any trunk line railroad was operating and was principally that of interstate commerce. *For many years prior to the passage in* 1901 *of the so-called Bush Act* it had been engaged *in both interstate and intrastate business* in Kansas. The company made application to the Charter Board for a certificate of authority to engage in business in Kansas, which application was granted, and it was ordered that a certificate of authority issue to transact the business of operating sleeping cars, dining cars, tourists cars and other cars within Kansas and receiving money for such services and transacting *within the State* the business of a sleeping car and transportation com- [fol. 183] pany upon payment to the State Treasury for the benefit of the permanent school fund of the sum of $14,800.00, which was the prescribed statutory percentage necessary to be paid by a foreign corporation with a capital of $74,000,000.00, seeking to transact business within the State, but that nothing in the order should be construed to restrict in any wise the transaction by the applicant of its interstate business, the grant of authority and requirement as to payment relating only to the business transacted wholly within Kansas. Mr. Justice Harlan, who delivered the opinion of the court, following Western U. Teleg. Co. v. Kansas, supra, held that the Pullman Company could not be restrained from doing local business within the State because of its refusal to pay the charter fee of a given per cent of its capital stock imposed by the so-called Bush Act, as a condition of doing such business, since such requirement was in effect a burden or tax both on the company's interstate business and property located and used outside the State, and compelled the company, in order that it might continue to do local business in Kansas in connection with

its interstate business to waive its constitutional exemption from State taxation on its interstate business and property outside of the State and contribute out of its capital to the support of the schools of Kansas, and pointed out that the Pullman Company at the time of the passage of the Bush Act was admittedly *engaged,* as it had been *continuously for many years,* in commerce among all the States of the Union, as well as in intrastate business in Kansas; that it did not appear how much of the "single fee" demanded by the State was to be referred to in the interstate business of the company, nor how much to its property out of the State, nor what part had reference to its intrastate business or to its property within the State. The facts showed that the same cars were used in furnishing accommodations to intrastate and interstate passengers and that both the interstate and intrastate business in which the company had engaged for many years in the State prior to the passage of the statute involved were necessarily largely carried on by the same agencies and through the same instrumentalities and were commingled and not separate and distinct, which fact was a controlling factor in the decision and distinguished the case from the General Railway Signal Co. case and the case at bar.

Mr. Justice White, in a concurring opinion, which is quoted from by the petitioner in its brief, called attention to the fact that the Pullman Company, many years before the passage of the Bush Act, entered Kansas and had since operated its cars therein for interstate, as well as local busi-
[fol. 184] ness, and that although the cars in passing in and out of the State may not have been constantly the same, a proportionate number of the cars so used were to be considered as having a definite situs in the State, and, therefore, as property permanently therein, subject to the taxing power of the State, and that he was not able to conclude that the company or its property were *not permanently in the State,* and hence that such property could be taken by the State without due process of law as a condition of the right to bring the property in the State and there carry on business; that while his concurrence in the Western Union case was placed upon the ground that the company *was in the State,* and consequently not subject to be dealt with upon the fictitious assumption that such was not the fact, *yet in his opinion, even though* the corporation and its prop-

erty were *out of the State,* and the tax in question was a condition affixed to the privilege of coming into the State and might be escaped by not doing local business, it was repugnant to the commerce clause of the Federal Constitution. He then proceeded to state certain dominant propositions, which he stated were not subject to be controverted, saying:

"1. A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. • • • 2. Even though a power exerted by a State, when inherently considered, may not, in and of itself, abstractly impose a direct burden on interstate commerce, nevertheless, such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. • • • 3. Subject to constitutional limitations, the States have the power to regulate the doing of local business within their borders. As a result of this power, and of the authority which government may exert over corporations, the States have the right to control the *coming* within their borders of foreign corporations. In cases where this power is absolute, the States may affix to the privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporation from coming in. When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into a State, and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because, by accepting the privilege, it has voluntarily consented to be bound by the condition. In other words, in such case the absolute power of the State is [fol. 185] the determining factor, and the validity of the condition is immaterial. This doctrine finds, in the decided cases, no terser and clearer statement than that expressed in the opinion in Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. Ed. 164. In that case, a manufacturing company, organized under the laws of Utah, was sought to be made liable for a tax on the franchise of carrying on, in the State of New York, a manufacturing business. It contested liability on the ground that the tax was repugnant to the Constitution of the United States. The court, in decid-

ing that the constitutionality of the burden was an irrelevant consideration because of the absolute power of the State to impose it as a condition on the right of the corporation to come into the State and do a manufacturing, and therefore local, business, said, speaking of the power of the State (p. 315): 'Having the absolute power of excluding the foreign corporation, the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, *or a sum proportioned to the amount of its capital.* No individual member of the corporation or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation.' And in a passage of the opinion previous to the one just quoted, concerning the right of a State, where its power to exclude was absolute, to impose such condition as it pleased, it was observed (p. 314): 'This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.' In addition, the following cases either directly, expressly, or by fair implication must be taken as sustaining the right of the State, where it has the absolute power to exclude, to affix whatever condition it deems proper to the right of a foreign corporation to come in, and the consequent inability of such corporation, after accepting the privilege, to assail the constitutionality of the condition. (Citing cases.) 4. The absolute power of the State, as stated in the preceding proposition, does not include the right to exclude a foreign corporation from doing in a state interstate commerce business, since the regulation of such business is vested by the Constitution in Congress, and the States are impotent, as stated in the first and second propositions, to directly burden the right to do such business, or to discriminate against those doing it. * * * And, indeed, by necessary impli- [fol. 186] cation, the want of power in the States to exclude corporations as well as individuals from carrying on within their borders interstate commerce results, by implication, from the decisions in the cases previously cited under proposition 3. This is aptly illustrated by the Horn Silver Min-

ing case, where, after stating, in the clearest way, the absolute power of the State, generally speaking, to exclude a foreign corporation, it was declared (pp. 314, 315): 'Only two exceptions or qualifications have been attached to it, in all the numerous adjudications in which the subject has been considered since the judgment of this court was announced more than half a century ago in Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1, 12, 24 L. Ed. 708, 711. The other limitation on the power of the State is where the corporation is in the employ of the general government,—an obvious exception, first stated, we think, by the late Mr. Justice Bradley in Stockton v. Baltimore & N. Y. R. Co., 1 Inters. Com. Rep. 411, 32 Fed. 9, 14. As that learned justice said: 'If Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the State'. Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 186, 31 L. Ed. 650. Let me, then, *test the question for decision* by the light of these principles. As it is obvious that the Pullman Company, *in so far* as it *was engaged* in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had *no absolute power* to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for *the privilege of doing local in conjunction with the interstate commerce business.* The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition. • • • Moreover, to me it seems that where the right to do an interstate commerce business *exists,* without regard to the assent of the State, a State law which *arbitrarily* forbids a corporation from carrying on with its interstate commerce business a local business would be a direct burden upon interstate commerce, and in conflict with the principles stated in proposition 1. This follows, since the imposition on a corporation which has the right to do interstate com- [fol. 187] merce business within the State of an unconstitu-

tional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business. It is not by me doubted that, as a practical question, the arbitrary prohibition against doing a local business, *imposed on one engaged in, and having the right to engage in,* interstate commerce, is to burden that business. * * * In other words, where the power to exclude is absolute, no inquiry as to the reasons for its exertion need be resorted to in order to determine its constitutionality. But, where the power is only relative, *because it may not be exerted under particular conditions and circumstances,* the violation of the Constitution cannot be accomplished by a failure to express the reason for the exclusion, and thus absolute power be exerted where such power does not exist. The controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly. It is to be observed that the conclusions just expressed take away from the states no lawful power. It leaves to the States the right to exert authority where such power is possessed, and simply requires that where, as a result of the Constitution of the United States, the power is not absolute, but is merely relative, *not* only *the right of regulation,* but likewise *the right to exclude,* must be exerted conformably to the requirements of the Constitution of the United States; that is, *in such a manner* as not, either directly, by the expression of a condition, or indirectly, by its nonexpression, to deprive of rights secured by that instrument. * * * *The only right here challenged* is the authority of a State to impose an *unconstitutional tax,* and validate the *tax* by *making the payment* of the unlawful *tax a condition of the right to do a local business.* * * *'' (Italics ours.)

Mr. Justice White recognized the absolute right of a State to exclude from the State a foreign corporation seeking to do local business in the State, not constituting or inseparably connected with, interstate commerce, e. g., the business of manufacturing, and the absolute right of the State to impose upon such a foreign corporation as a condition of its right to enter the State to do local business the payment of a specific license tax or a sum apportioned to the amount of its authorized capital stock, quoting with approval Horn Silver Min. & Mill. Co. v. New York, 143 U. S. 305, 36 L.

Ed. 164, and Pembina Consol. Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 186, 31 L. Ed. 650. It would seem that if he had had under consideration the right of a foreign [fol. 188] corporation engaged in the contracting and construction business, as is the petitioner, which was separate and distinct from the business of interstate commerce, he would have followed the rule laid down in the two cases last cited. There is nothing in the opinion of Mr. Justice White to indicate that he intended to lay down the rule that the mere fact that a foreign corporation is authorized to engage, or is engaged, in interstate commerce business in a State, such State is without the power to impose an entrance fee, such as the initial entrance fee and the additional entrance fee, involved in the case at bar, upon such corporation when it seeks to secure admission into the State to transact purely local business therein, which is not of itself commerce or is not inseparably connected with interstate commerce, and which is not to be carried on by the same agencies and through the same instrumentalities or that he intended to hold that a foreign corporation, not chartered specifically to engage in business not necessarily constituting commerce, can by engaging in interstate commerce in a state, deprive such State of the absolute right to impose upon it, as a condition of the right to do local business in the State, an entrance fee which is not unreasonable or arbitrary; that Mr. Justice White did not intend to so hold is demonstrated by the fact that he was a member of the court when the General Railway Signal Company case was decided by an unanimous court. It may also be observed that that part of his opinion dealing with the absolute right of a State to exclude a foreign corporation which was chartered to engage and is engaged in interstate commerce was dictum, for the Pullman Company and its property *were within the State* and such view as to such absolute right of exclusion was based on the assumption that the corporation and its property were without the State, and that the tax was a condition affixed to the privilege of coming into the State to do local business, and that such views were Mr. Justice White's individual views and not those of the court. In fact in the latter part of his opinion, he virtually states that the views which he expressed were his individual views. The opinion of Mr. Justice White was not concurred in by any of the other members of the Supreme Court and it has

never followed the views expressed by Mr. Justice White in respect to what he termed the absolute and relative rights of the State to impose conditions upon foreign corporations chartered to engage in and actually engaged in interstate commerce in such State, when it seeks to secure admission to the State to do local business and to become a quasi-citizen of the State and entitled to equal privileges with citizens of the State.

[fol. 189] Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. Ed. 423, involved the question of the validity of a statute requiring *all* foreign corporations seeking to do business in the State to pay for the *filing* of their articles of incorporation certain fees, based upon its authorized capital stock, and providing that *any* foreign corporation *which should fail to comply with the provisions of the Act and do business in the State, should be fined.* Since 1867 the Western Union Telegraph Company had its lines within Arkansas connected with and forming a component part of its company's system and connecting with its main office in New York. Prior to the passage of such statute the company had invested in lines in Arkansas the sum of $153,000.00 and continually since their construction it had used them "for the transmission of telegraph messages for the government of the United States and the several departments thereof, and *for the public* as an instrumentality of the Postal Department and of commerce wholly within the State of Arkansas" and "*also for interstate commerce and commerce between the points in said State and foreign countries,* and said telegraph lines had been continuously employed in domestic, interstate and foreign commerce since their construction". The capital stock of the company was $100,000,000.00, and the sum required to be paid as a condition of the company's right to have its articles of incorporation filed and thereafter to *continue doing business within Arkansas, without incurring the penalties prescribed by the statute,* was $25,050.00. Mr. Justice Harlan, who delivered the opinion of the court, said:

"Interpreting it according to the ordinary acceptation of its words, the statute does not discriminate between corporations whose business is intrastate in its character, so to make it clear that the State has not assumed to regulate or burden interstate business. Its words are unqualified and are made applicable to '*every* company or corporation in-

corporated under the laws of any other state, territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State'. Sec. 1. '*Any* foreign corporation which shall fail to comply with the provisions of this act and shall do *any* business in this State', etc. Sec. 2. '*All* corporations hereafter incorporated in this State, and *all* foreign corporations *seeking* to do business in this State', etc. According to the words of the statute, not unreasonably construed, *every* corporation of another State, seeking to do business in Arkansas, whether interstate or domestic, in [fol. 190] order that it may do business of any kind in Arkansas, without coming into conflict with the statute, must file a copy of its authenticated charter with the Secretary of State; and it seems that before that officer will file such copy, the corporation must pay to him a given amount based upon its capital stock, representing, necessarily, *all* its business, *interstate and intrastate,* as well as *all* its property everywhere, *beyond as well as within the State.* If the foreign corporation, without first paying those amounts, *does business of any kind* in the State, it will incur not only the penalty of $1,000 for so doing, but will forfeit its right to make any contract in the State, enforceable in law or equity,—whatever its subject-matter,—even if it be one relating to the business of the United States or to commerce among States. A statute of that kind would be palpably in conflict with the Constitution, and especially an invasion of rights under that instrument of a corporation engaged in interstate commerce and seeking to do business in Arkansas. * * * But even if we should assume that the State court would construe the statute of 1907 as intended not to apply to interstate commerce, but only to local or intrastate business, *we are,* nevertheless, *informed* by its decision in Western U. Teleg. Co. v. State, 82 Ark. 309, 318, 101 S. W. 748, that, *in the opinion of the State court,* the statute so construed *is valid,* and therefore the telegraph company, in order that it may safely *continue* local business in Arkansas, *must* first pay into the treasury of the State certain amounts based on its *entire capital stock for simply filing its articles of incorporation* with the Secretary of State; and if it does not pay the specified fees, based on its entire capital stock, and yet *continues* to do intrastate business in Arkansas, it will incur the pre-

scribed penalty of *one thousand dollars* for *continuing* to do business in the State, and, in addition, lose its power or right to make any enforceable contract in the State. These are in effect, *conditions* upon which the telegraph company, *lawfully engaged in interstate business, and entitled to be in Arkansas* for such business, is permitted to enter the State to do local business within its limits. *And these conditions have been prescribed, notwithstanding the company has been permitted for many years, long before the act here in question was passed, to do local business in the State* with its permission and acquiescence, and *has invested there large sums of money* in preparing to serve the public efficiently in that kind of business. The capital stock of the company represents, we repeat, *all* its business, property, and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, to continue to do a local [fol. 191] business in Arkansas, and escape the heavy penalties prescribed, must pay a *given amount* (in this case $25,050), *based on all its capital stock, merely for filing its articles of incorporation* with the Secretary of State, *is*, in effect, *a direct burden and tax* on its interstate business, as well as on its property outside of the State. The case cannot be distinguished in principle from Western U. Teleg. Co. v. Kansas and Pullman Co. v. Kansas; recently decided (216 U. S. 1, 56, ante, 355, 378, 30 Sup. Ct. Rep. 190, 232). The difference in the wording of the Kansas and Arkansas statutes, cannot take the present case out of the ruling of the former cases."

The Arkansas statute did not impose the charge complained of as a condition of the right of the foreign corporation to enter the State for the purpose of becoming a quasi-citizen of the State, but under the guise of a fee plainly imposed a tax based upon the authorized capital stock and no maximum fee was prescribed. The charge was imposed upon *every* corporation doing business in the State, and a penalty was imposed upon a foreign corporation *already doing business in the State* for thereafter continuing to do business in the State without the filing of its charter and the payment of the tax. The telegraph company had been engaged in both interstate and intrastate business, necessarily carried on together and by the same

agencies and through the same instrumentalities for many years prior to the passage of the statute involved. The facts in connection with its entering the State, its building its lines, its use thereof and the conduct of its interstate and local business by means of and through the same agencies and instrumentalities were the same as in Western U. Teleg. Co. v. Kansas, supra, and what we have said in respect to the case is equally applicable to the Ludwig case.

Ludwig v. Western U. Teleg. C., supra, was also cited, along with Western U. Teleg. Co. v. Kansas, supra, and Pullman Co. v. Kansas, supra, in the brief of the plaintiff in error in General Railway Signal Co. case, supra, (62 L. Ed. p. 854) in support of the contention of the plaintiff in error that the entrance fee imposed by the Virginia statute was repugnant to the Federal Constitution, but these cases were not referred to by Mr. Justice McReynolds in his opinion in the General Railway Signal Co. case, which, as heretofore stated, was decided by an unanimous court, and Mr. Justice White (who had become Chief Justice) was then a member of the court, as was also Mr. Justice Day. It may be also observed that Western U. Teleg. Co. v. Kansas was decided by a divided court, Mr. Chief Justice Fuller [fol. 192] and Messrs. Justices Holmes, McKenna and Peckham dissenting, Pullman Co. v. Kansas and Ludwig v. Western U. Teleg. Co. were also decided by a divided court, Mr. Chief Justice Fuller and Messrs. Justices Holmes and McKenna dissenting.

The distinction between the Western U. Teleg. Co. v. Kansas and Pullman Co. v. Kansas cases is pointed out in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85, 58 L. Ed. 127, 134, where Mr. Justice Day said:

"In Western U. Teleg. Co. v. Kansas, and Pullman Co. v. Kansas, the statute under which the State of Kansas undertook to levy a charter fee of 1/10 of 1 per cent of their authorized capital upon the first $100,000 of the capital stock of foreign corporations, and 1/20 of 1 per cent upon the next $400,000, and for each million or major part thereof, $200, making a tax of $20,100 against the Western Union Telegraph Company, and $14,800 against the Pullman Company, was declared to be unconstitutional, as having the effect not simply to exert the lawful power of taxing a foreign corporation for the privilege of doing local business, but to burden interstate commerce, and to reach prop-

erty represented by the capital stock of the companies, which was duly paid in and invested in property in many states, and therefore beyond the taxing jurisdiction of Kansas. Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the Western U. Teleg. Co. case, the company had a large amount of property permanently located within the State, and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the State, in state and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of State lines in its prosecution. * * * In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is [fol. 193] within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

In Frost v. Railroad Commission of the State of California, 271 U. S. 583, 70 L. Ed. 1101, in holding that the State, having power to deny a privilege altogether, may grant it upon such conditions, not requiring relinquishment of constitutional rights, as it sees fit to impose, Mr. Justice

Sutherland, who delivered the opinion of the court, in referring to Western U. Teleg. Co. v. Kansas, supra, pointed out the scope of that case, saying:

"That case involved the validity of a Kansas statute which provided that a corporation of another State, *though engaged in interstate business,* must *as a condition of doing local business,* pay to the State *certain graduated percentages of its capital stock.* It was held that this requirement operated as a burden on the interstate business of the company, in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the State, in violation of the due process of law clause; that, thus, it was violative of the constitutional rights of the company; and that the right of the company to *continue* to do business in Kansas was not and could not be affected by the condition. The general principal was again announced in the following words. * * * 'The right of the Telegraph Company *to continue* the transaction of *local* business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its *constitutional exemption from State taxation,* direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution.' " (Italics ours.)

In Crescent Cotton Oil Co. v. Mississippi. 257 U. S. 129, 66 L. Ed. 166, 170, Mr. Justice Clarke said:

[fol. 194] "Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. Ed. 378; Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. Ed. 423; * * * are relied upon to sustain this contention of the plaintiff in error. In the first two of the cases cited an attempt was made by the State of Kansas to *tax* interstate carriers on the basis of all of their property, wherever situated, as measured by the capital stock of the companies. In the third case a similar attempt was made by the State of Arkansas. There was no question in any of these cases but that the principal business of the companies challenging the taxing law was interstate in character, and

that their chief investment was in property used in and necessary to the conduct of their interstate commerce. The controversy in the cases was as to the incidence of the *tax*,—whether it was so imposed upon the property of the companies or the stock representing it, as to constitute a direct and substantial burden upon the interstate commerce in which they were engaged. * * * Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a State, and where, as here, no contract right is involved, and there is no employment by the Federal government, it is the settled law that a State may impose conditions, in its discretion, upon the right of such a corporation to do business within the State, even to the extent of excluding it altogether. Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. Ed. 164, 4 Inters. Com. Rep. 57; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. Ed. 127, 133, and cases cited." (Italics ours.)

The distinction between the General Railway Signal Company case and the Western U. Teleg. Co. v. Kansas, Pullman Co. v. Kansas and Ludwig v. Western U. Teleg. Co. cases is apparent from the several cases from which quotations have just been made, and it is apparent that the three cases last mentioned are not pertinent to and should have no controlling weight in the determination of the questions now under consideration.

The contention of the petitioner that the Baltic Mining Company case, 231 U. S. 68, 58 L. Ed. 127, which was cited by Mr. Justice McReynolds in his opinion in the General Signal case has been overruled, will now be considered. In this case it was held that the excise tax exacted from foreign corporations by Mass. Pub. Stat. 1909, ch. 490, for the privilege of doing business in the State, as applied to corporations which were incorporated to carry on a business not of itself interstate commerce, though their products were [fol. 195] sold and shipped in such commerce, and which were carrying on a purely local and domestic business quite separate from their interstate transactions, was not invalid under the commerce and due process clauses of the Federal Constitution, as necessarily amounting to a burden and tax upon the interstate business of such corporations and on their property outside the State, although the tax was imposed by taking a percentage of the entire authorized capital stock, where the facts that such authorized capital was

but a part of the entire property and assets of the corporation, and that the maximum yearly tax was $2,000.00, compelled the conclusion that the authorized capital is used only as a measure of the tax. Mr. Justice Day, delivering the opinion of the court, recognized the right of the State to exclude a foreign corporation from its borders, so long as no provision of the Federal Constitution is violated by such exclusion, and the right to prescribe conditions upon which a foreign corporation may continue to do business in the State, unless some contract right in favor of the corporation prevents, or some constitutional right is denied in the exclusion of such corporation, and distinguished Western U. Teleg. Co. v. Kansas, supra, and Pullman Co. v. Kansas, supra, on the grounds that the *business* of both complaining companies was *commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character,* and that, in the Western Union Telegraph Company case, the company had a large amount of property permanently located within the State, and between 800 and 900 offices constantly carrying on both state and interstate business, and that the Pullman Company had been running a large number of cars within the State, in state and interstate business, for many years, and that in such cases "there was no attempt to separate the intrastate business from the interstate business by the limitations of State lines in its prosecution"; that each case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases; that it is not within the authority of a State to tax interstate commerce by burdensome laws; that it was apparent that each of the corporations in question was engaged in a purely local and domestic business, quite separate from its interstate business; that the *local* and *domestic* business; for the privilege of doing which the State had imposed a tax, was real and substantial, and not so connected with interstate commerce [fol. 196] as to render a tax upon it any burden upon the interstate business of the companies involved; that the tax was levied upon a legitimate subject of taxation and was not void because imposed upon property beyond the State's jurisdiction, if the property itself was not taxed and, in so

far as it was represented in the authorized capital stock, was used only as a *measure* of taxation. The contention that the Baltic Mining Company case has been expressly overruled by Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 69 L. Ed. 916, is unfounded. In the latter case the court said:

"It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the 14th Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant where there is no legislative basis for the tax. So far as the language of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 87, 58 L. Ed. 127, 134, tends to support a different view, it conflicts with the conclusions reached in the latter opinion and is now definitely disapproved."

The Alpha Portland Cement Co. was engaged solely in interstate commerce and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision the particular point considered should always be borne in mind. The court called attention to this subject in the Baltic Mining Company case, saying: "Every case involving the validity of a tax must be decided upon its own facts and having no disposition to limit the authority to those cases the facts upon which they were decided must not be lost sight of in deciding other and similar cases." In the nine cases arising in Massachusetts, and decided four years after the decision in the Baltic Mining Company case, reported as, International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. Ed. 624; Locomobile Co. v. Massachusetts, 246 U. S. 146, 62 L. Ed. 631, and Cheney Bros. v. Massachusetts (seven cases), 246 U. S. 147, 62 L. Ed. 632, clearly the doctrine of the Baltic Mining Company case was not overruled or qualified but was reaffirmed. In the Paper Company and the Locomobile cases the taxes were held invalid for the reason alone that prior to their imposition the State statute had been amended by removing therefrom the [fol. 197] maximum limit of the exaction, and in the Cheney

Brothers case, because the plaintiff was engaged exclusively in interstate business, but in the other six cases involved in the Cheney Brothers case, where the corporations were engaged in both classes of business and the statute had not been amended prior to the imposition of the tax, the court, following the rule of the Baltic Mining Company case, denied relief. The court regarded the presence or absence of a reasonable maximum or the fact that the corporation was engaged exclusively in interstate business as a controlling consideration. In summing up its decisions in the Alpha Portland Cement case, the court said:

"The excise challenge by plaintiff is not materially different from the one declared unconstitutional in Cheney Brothers v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the State."

It will thus be seen that the decision in the Alpha Portland Cement case was regarded as being strictly within the rule of the Cheney Brothers case, but, as we have seen, that case cannot be deemed out of harmony with the Baltic Mining Company case, for the reason that in six other cases decided at the same time, the court expressly applied without qualification or limitation the doctrine of the Baltic Mining Company case. In Looney v. Crane Co., 245 U. S. 178, 62 L. Ed. 230, which has heretofore been considered at length, the court held that the Baltic Mining Company case and other cases mentioned by it did not overrule the Western U. Teleg. Company case and other cases cited in connection therewith in the Baltic Mining Company case, and it follows that the cases relied upon as overruling the Baltic Mining Company case, unless they go farther than the earlier cases, do not do so. As heretofore pointed out, the Cudahy Packing Company case does not overrule the Baltic Mining Company case, but followed Looney v. Crane, supra, in which it was held that statutes which impose a direct burden upon interstate commerce or directly constitute a regulation thereof, cannot be sustained merely because a maximum limit is placed upon the amount thereof. In the Baltic Mining Company case the opinion was written by Mr. Justice Day, the late Chief Justice White, and Messrs. Justices Pitney and VanDevanter dissenting. The opinion in the General Railway Signal Company case was written

by Mr. Justice McReynolds and concurred in by all the court, while Mr. Chief Justice White and Messrs. Justices VanDevanter, Day and Pitney were members of the court. [fol. 198] It may be observed, however, that in the Baltic Mining Company case, the question involved was the validity of a statute exacting an annual excise tax from a foreign corporation (which had already been admitted to do and was doing local business in the State) for the privilege of doing intrastate business in the State; and no question of the validity of a mere admission or entrance fee required as a condition of securing a certificate of authority to do local business in the State was involved, so that even if such case had been overruled, which, however, is not true, that fact of itself would not destroy the controlling effect of the General Ry. Signal Company case.

Kansas City, Ft. S. & M. Ry. Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617, cited by Mr. Justice McReynolds, in the General Ry. Signal Company case, along with the Baltic Mining Company case, and said by the petitioner in its brief not to be "in point" involved the question of an annual tax graduated according to paid-up capital imposed upon domestic corporations for the privilege of being a corporation, but in such case Mr. Justice Hughes cited with approval the Baltic Mining Company case and reiterated the rule there laid down that every case involving the validity of a tax must be decided on its own facts and that where the authorized capital stock is only used as a *measure* of an annual franchise tax on a foreign corporation, and *has a fixed maximum* it cannot be regarded as a direct burden upon interstate commerce or a tax on property without the State; and that if a tax purports to be laid upon a subject within the taxing authority of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its *necessary* operation and effect is to make it a prohibited exaction. Mr. Justice Hughes, in referring to Western U. Teleg. Co. v. Kansas, Pullman Co. v. Kansas, and Ludwig v. Western U. Teleg. Co. quoted from Flint v. Stone Tracy, 220 U. S. 107, 55 L. Ed. 389, 419, where it was stated that the tax imposed by the Kansas statute, involved in Western U. Teleg. Co. v. Kansas, and Pullman Co. v. Kansas, was in reality a tax upon the right to do an interstate business within the State and an undertaking to *tax* property beyond the limits of the State and

that the *necessary* operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and said:

"And in the case of Baltic Min. Co. v. Massachusetts, supra, where a tax on foreign corporations was measured by the authorized capital stock and was limited to $2,000, [fol. 199] the court also reached the conclusion 'that the authorized capital is only used as the measure of a tax, in iself lawful, without the necessary effect of burdening interstate commerce', and that hence the legislation was within the authority of the State. It is true that in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce; but it was also distinctly stated that the products of the corporations before the court were 'sold and shipped in interstate commerce', and that to that extent they were 'engaged in the business of carrying on interstate commerce', and were 'entitled to the protection of the Federal Constitution against laws burdening commerce of that *character'. It was because the tax, although measured by authorized capital stock, could not, in view of its limitations, be regarded as imposing a direct burden upon interstate commerce,* that the tax was upheld. 231 U. S., pp. 86, 87." (Italics ours.)

Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. Ed. 176, also cited by Mr. Justice McReynolds in the General Ry. Signal Company case, along with the Baltic Mining case, and said by the petitioner in its brief not to be "in point", involved the validity of an annual franchise tax imposed by the State of Alabama upon a consolidated railway company existing under the laws of several States, including Alabama and owning and operating a railroad and engaged in interstate commerce in all of such States. Such consolidated corporation was by statute made an Alabama corporation. The annual franchise tax was measured by the entire capital stock of the consolidated company instead of measuring it by the amount of capital stock employed in the State as was done in case of foreign corporations doing business in Alabama. The court held that because it was a domestic corporation a franchise tax based on the entire

capital stock of the consolidated railroad did not contravene the commerce clause or the due process clause or the equal protection clause of the Federal Constitution, but Mr. Justice Day, in considering the contention that the tax was void because it undertook to tax property beyond the jurisdiction of the State and impose a direct burden upon interstate commerce, cited with approval Kansas City, Ft. S. & M. R. Co. v. Botkin, and quoted from the opinion in that case and stated that the State, while it may not tax property beyond its borders, may *measure* a tax within its authority by capital stock which is *in part* represented by property beyond the taxing power of the State; that a dis- [fol. 200] tinction is to be drawn between a property tax and a franchise tax within the authority of the State *in part* measured by the capital stock representing property owned in other States; that while a State may not regulate interstate commerce or impose burdens upon it it is authorized to levy a tax within its authority measured by capital *in part* used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In this case the court referred to Western U. Teleg. Co. v. Kansas, and stated that in that case a tax was sought to be imposed upon a corporation *already engaged* in interstate commerce in the State for the privilege of doing local business therein, and "under the *circumstances* therein disclosed and the *character of the business* involved, the court held that the statute was 'in substance an attempt to tax the right to do interstate business'." While the corporations affected by the charge considered in Kansas City, F. S. & M. R. Co. v. Botkin and Kansas City, M. & B. R. Co. v. Stiles, were domestic corporations, yet the principles laid down in each of such cases in respect to a charge *in part* measured by authorized capital stock are equally applicable to foreign corporations and to the Virginia statutes considered in the General Railway Signal Company case.

We cannot see the relevancy of St. Louis, S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. Ed. 265, which was cited by Mr. Justice McReynolds in connection with the Baltic Mining Company case, and is said by the petitioner in its brief not to be in point but that fact of itself cannot destroy the weight of the General Ry. Signal Company case, unless the

relevancy of a citation is to be held to control the soundness of a judicial conclusion.

International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. Ed. 624, is also relied upon by the petitioner in support of its contention that the Virginia statutes are unconstitutional. This case was decided on March 4, 1918, by an unanimous court, Mr. Justice VanDevanter delivering the opinion of the court, and it was cited in the General Railway Signal Company case as illustrative of the fact that the latter case was "on the border line". It involved a suit to recover the amount of "an excise tax" assessed against it in Massachusetts for the year 1915 and paid under protest, the right to recovery being predicated on the asserted invalidity of the *tax* under the commerce clause of the Federal Constitution and the due process clause of the 14th Amendment. The Massachusetts statutes, under which the tax was imposed, read as follows:

[fol. 201] Stat. 1909, chap. 490, pt. 3, sec. 56. "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of 1/50 of 1 per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000."

Stat. 1914, chap. 724, sec. 1. "Every foreign corporation subject to the tax imposed by sec. 56 of pt. 3 of chapter 490 of the acts of the year 1909 shall in each year, at the time of filing its annual certificate of condition, pay to the treasury and receiver general, for the use of the Commonwealth, in addition to the tax imposed by said sec. 56, an excise tax to be assessed by the tax commissioner of 1/100 of 1 per cent of the par value of its authorized capital stock in excess of $10,000,000 as stated in its annual certificate of condition."

While the legislation was enacted in part in 1909 and in part in 1914, it was held that its operation and validity must be determined by *considering it as a whole,* for the opinion of the State court which had sustained the tax (228 Mass. 101, 117 N. E. 246), held that the "maximum limita-

tion'' put on the tax by the part first enacted was ''removed'' by the other, but treated the two parts as exacting a single tax based on the par value of ''then entire authorized capital'' and computed as to $10,000.00 thereof at the rate of 1/50 of 1 per cent and as to the excess at the rate of 1/100 of 1 per cent. The facts involved in the case were: that the company upon which the tax was sought to be imposed had an authorized capital stock of $45,000,000.00; that its total assets were less than $40,000,000.00, of which not more than 1¾ per cent were located and vested in Massachusetts; that the company was engaged in the business of manufacturing and selling paper, operating in that connection twenty-three paper mills, one of which was in Massachusetts and twenty-two in other States; that its executive and financial offices were in New York City; that only a small portion of its real and personal property was in Massachusetts; that the output of its mills were sold in both interstate and intrastate commerce, principally the former; that while the company maintained a selling office in Massachusetts, 86 per cent of the sales through such office were in interstate commerce and the remainder were local to Massachusetts and that the tax in question amounting to $5,500.00 was in addition to the property tax of $811.00 on its real and personal property in the State, which was assessed at $472,000.00. Mr. Justice VanDevanter [fol. 202] cited Western U. Teleg. Co. v. Kansas, Pullman Co. v. Kansas, and Ludwig v. Western U. Teleg. Co., and after stating that such cases established certain principles in reference to the power of a State to regulate intrastate business and to tax the interstate business and property within the State of a corporation engaged in both interstate and intrastate business, among which was that *a license fee or excise* of a given per cent of the entire authorized capital stock of a foreign corporation doing both a local and interstate business, though declared to be merely a charge for the privilege of doing a local business, is a tax upon the entire business of the corporation including that which is interstate and on its entire property including that in other states, because such capital stock represents all its business of every class and all its property wherever located and therefore contravenes the commerce clause and due process clause of the Federal Constitution and that there is no distinction in this respect where the corporation is engaged in

both interstate and intrastate commerce between such business conducted by a common carrier and that conducted by a trading company, distinguished the statute involved in the case under consideration from that involved in the Baltic Mining Company case on the ground that the statute involved in the latter case prescribed a fixed maximum, which had been removed by the statute enacted in 1914, under which later statute the tax involved in the case under consideration was imposed. The Baltic Mining Company case was not overruled by this case, but on the contrary the validity of the statute there involved was recognized, though it was again stated that nothing in that case should be held to sustain the assumption that because a violation of the Federal Constitution was not a large one it was to be sanctioned or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated should be treated as affording a measure of the duty of enforcing the Constitution. There is nothing in International Paper Co. v. Massachusetts, (which only involved an *annual excise tax*), to support the contention that the initial entrance fee and/or additional entrance fee prescribed by the Virginia statutes under consideration as a condition of a foreign corporation securing admission into the State for the purpose of doing local business therein contravene the commerce and due process of law clauses of the Federal Constitution.

The petitioner also cites Locomobile Co. of America v. Massachusetts, 246 U. S. 146, 62 L. Ed. 631, decided March 4, 1918, considering the same Massachusetts statutes involved in International Paper Co. v. Massachusetts, supra, [fol. 203] where the same questions were involved and where an excise tax of $1,300.00, was imposed on a West Virginia corporation for doing a local business in Massachusetts during the year 1915, and the corporation was engaged in manufacturing in Connecticut and sold its manufacturing articles extensively in interstate commece and did both an interstate and a local business in Massachusetts, each of which was of considerable volume, though the interstate was much the larger. This case was decided by an unanimous court shortly before the decision in the General Railway Signal Company case, and was decided on the same grounds as International Paper Co. v. Massachusetts, supra.

In Cheney Bros. Co. v. Masachusetts, 246 U. S. 147, 62 L. Ed. 632, Mr. Justice VanDevanter, delivering the opinion of the court, said:

"We are here concerned with an excise tax imposed by Massachusetts in 1913 on each of seven foreign corporations on the ground that each was doing a local business in the State. Objections to the tax based on the commerce clause of the Constitution and the due process and equal protection clauses of the 14th Amendment, were overruled by the State court. * * * The tax was imposed under Statute 199, ch. 490, pt. 3, sec. 56, before the maximum limit was removed by St. 1914, ch. 724, sec. 1, and in that respect the case is like Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127, and unlike International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. Ed. 319. Whether in other respects it is like Baltic Mining Co. v. Massachusetts is a matter to be determined, and this requires that the *business done* by *each* of the seven corporations be considered."

The court then examined the facts and found that *Cheney Brothers Company was doing no intrastate business but solely an interstate business in Massachusetts,* and, therefore, was not subject to the tax, and that the tax imposed upon it "was essentially a *tax on doing an interstate business,* and therefore repugnant to the commerce clause". The other six corporations were found to be doing both an intrastate and interstate business and the excise tax was upheld, the court saying:

"Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, which was *before* the maximum limit was removed, it follows from our decision in Baltic Mining Co. v. Massachusetts, that the several objections based [fol. 204] on the Constitution of the United States are all untenable, save in the instance of the Cheney Brothers Company. The tax on that company, as before indicated, was a tax on interstate business, and therefore void under the commerce clause." (Italics ours.)

It is to be noted that Internationl Paper Co. v. Massachusetts, supra, Locomobile Co. v. Massachusetts, supra, and Cheney Brothers Co. v. Massachusetts, supra, were all

argued on the same day, by the same counsel, and were decided on the same day by an unanmious court, and that the opinion in each case was delivered by Mr. Justice VanDevanter. It is to be further noted (see briefs reported in 62 L. Ed.), that in each of such cases Western U. Telegraph Co. v. Kansas, supra, Pullman Co. v. Kansas, supra, and Ludwig v. Western U. Teleg. Co., supra, were cited in support of the invalidity of the statute involved, and that all three of the cases last cited and Looney v. Crane, 245 U. S. 178, 62 L. Ed. 230, were referred to and considered in the opinion of Mr. Justice VanDevanter in his opinion in the International Paper Company case, and the Locomobile Company case, and yet he upheld an excise tax where the foreign corporation was engaged in both intrastate and interstate business, although the tax was of a designated percentage of the authorized capital but a maximum limit was fixed. Unquestionably in none of these cases was the Baltic Mining Company case overruled, but on the contrary it was recognized as a binding authority when such cases were decided by an unanimous court on March 4, 1918. These three cases involved an annual license tax or franchise tax and in no wise involved an entrance fee for securing a certificate of authority to do local business in the State, and it was certainly logical and proper for the Supreme Court of the United States to hold, as it did in the General Railway Signal Company case, that the exaction from a foreign corporation having a capital stock of $5,000,000.00 of the $1,000.00 fee fixed by Acts General Assembly of Virginia 1910, ch. 32, sec. 38-a, as a condition of permitting foreign corporations with a capital stock of more than $1,000,000.00 and not exceeding $10,000,000.00 to procure a certificate of authority to do local business in Virginia, separate and distinct from interstate commerce, did not unlawfully burden interstate commerce, the fees prescribed by the statute not varying in direct proportion to capital stock and there being a fixed maximum. To so hold was not in conflict with any — these cases.

In Airway Electric Appliance Corporation v. Day, 266 U. S. 71, 69 L. Ed. 169, which is cited by the petitioner in [fol. 205] support of its contention that the statutes involved in the case now under consideration are repugnant to the commerce clause of the Federal Constitution and to the due process clause of the 14th Amendment thereto, it

was held that a State statute which imposes a *tax* upon the entire authorized capital stock of a foreign corporation *located within the State and doing an interstate business,* the issue of which is much less than that authorized, violates the commerce clause of the Federal Constitution, since the tax upon all the shares except the portion of the issue stock representing the business in the State, is a burden upon interstate commerce, and that the number of shares of stock of a foreign corporation which are authorized and not issued is not a reasonable measure of the *annual franchise fee or tax* which may be imposed upon it for the privilege of doing business in the State. In such case there was involved *only an annual franchise fee or tax* imposed upon the foreign corporation for the privilege of exercising its franchises in Ohio during the year commencing July 1, 1921. The corporation was incorporated in 1920 under the laws of Delaware, and under its certificate of incorporation and the laws of that State, its authorized capital stock was 400,000 shares of common stock without par value. Shortly after its incorporation it obtained from the Secretary of State, in conformity with the laws of Ohio, *a certificate of admission* to do business in the State and also paid the *initial fee* for the privilege of there exercising its franchise. *No complaint in respect to the statute requiring the procuring of this certificate of admission or the payment of this initial fee was involved in the case.* The corporation acquired two large manufacturing plants in Ohio and commenced business—the manufacture of electrical household appliances and their sale in Ohio and elsewhere. In July, 1921, as required by law, it filed with the Tax Commission a report covering the year ending July 1, 1921. There had been issued and were then outstanding only 50,485 shares of stock. All of its property was located in Ohio. Its value was $458,278.56. The amount of business transacted in the preceding year was $250,594.58, which represented its total sales, of which about 28 per cent was intrastate and the balance of about 72 per cent was interstate. *It was admitted that the value of the stock was* $7.00 *a share.* Section 5503 (enacted May 31, 1911) imposed an annual fee required of foreign corporations having capital stock with par value as follows:

"On or before October 15th, the Auditor of State shall charge for collection, as herein provided, *annually,* from

[fol. 206] such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this State, a fee of 3/20 of 1 per cent upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this State. * * *" (Italics ours.)

An Act of May 17, 1921 (Ohio Gen. Code, sections 8728-11) provided:

"* * * The amount of fees payable by a foreign corporation having common stock without par value—under section 5503, shall be 3/20 of 1 per cent upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this State, *and* 5c *per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this State.* * * *"

The State officers, assuming that all of plaintiff's property was assessable and all of its business was transacted in Ohio, made no apportionment between local and interstate business and fixed the *annual franchise fee* at 5c a share on its *total authorized capital stock.* The District Court changed the assessment to $14,926.00—5c per share on 289,520 shares. These figures were arrived at by taking such proportion of 400,000, the *total number of shares authorized,* as the actual value of the corporation's property in Ohio, plus its local business in that State, was to such actual value, plus all its business and by applying thereto 5c a share. Mr. Justice Butler delivering the opinion of the court, after quoting the six propositions laid down in International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. Ed. 624, 629, said:

"All plaintiff's business, intrastate and interstate, and all its property, wherever located, were represented by the 50,485 shares of stock outstanding. The annual fee demanded by the State officers is 5 cents per share on 400,000 shares, and that fixed by the lower court is based on 298,520 shares. The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the *number* of shares authorized, sub-

ject to the charge of 5c each, exceeds the *number* of outstanding shares attributable to or represented by the corporation's property and business in that State. In this case, the fee fixed by the Commission was based on nearly [fol. 207] eight times the *number* of outstanding shares, and that determined by the court on nearly six times that *number*. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff. International Paper Co. v. Massachusetts * * *. We hold that the act violates the commerce clause.

"The fee determined by the lower court, as well as that fixed by the State officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. Indeed, *under the Constitution and laws of Ohio,* a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value thereafter. Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564. That value depends on the property owned and used and business transacted in Ohio Sections 8728-11. Plaintiff's authority to issue stock, or the number of shares it may have outstanding at any time, does not depend upon the laws of Ohio. Under the laws of Delaware, where the corporation was organized, these matters are left to the discretion of the persons controlling the corporations. Del. Laws 1917, chap. 113, sec. 3; Revised Code, chap. 65, 1918a, sec. 4a. The *number of* non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital. Each outstanding share represents merely an aliquot part of its assets. The number of shares not subscribed or issued *has no relation to the privilege held by plaintiff in Ohio,* and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued, or additional shares may be issued to acquire property or do business in other States, or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock, or to its value,

or to the amount of plaintiff's capital, its property, or its business, intrastate in Ohio or interstate." (Italics ours.)

The Air-Way Electric Appliance Corporation case did not involve the validity of a statute requiring the payment of a fee as a condition of obtaining a certificate of authority to do intrastate business in the State *before* the corporation [fol. 208] begins so to do, but it involved an annual license or franchise tax levied *after the corporation had acquired property and commenced business in the State* and had built up *a large interstate and intrastate business* and which required no apportionment between local and interstate business. All the plaintiff's business, intrastate and interstate, and all its property wherever located, were represented by the 50,485 shares of stock outstanding, yet the annual tax demanded by the State officers was 5c a share on 400,000 shares and that fixed by the lower court was based on 298,520 shares and, for the reasons stated in the opinion, the *annual franchise tax* necessarily amounted to a tax and direct burden upon all the property and business, including the interstate commerce of the corporation and its property located outside of Ohio. The case cited has no bearing upon the questions now being considered and the case is no authority for the contention of the petitioner that an *entrance fee* in which the authorized capital stock of a corporation is used in part as a measure but which is limited in amount, as in the case of the Virginia statutes, illegally burdens interstate commerce, or imposes a tax upon property outside the State. The fact that it was an annual charge made its practical operation that of a *property tax*, as distinguished from a *privilege* or mere entrance fee.

The petitioner in its brief cites and quotes from O'Gara Coal Co. v. Emmerson, 326 Ill. 18, 156 N. E. 814, which it states clearly brings out the distinction between the power of a State in matters of taxation over a domestic corporation and over a foreign corporation, and which will hereafter be discussed in reference to whether or not the Virginia statutes deny to a foreign corporation the equal protection of the law, but inasmuch as the quotations from this case, found in the petitioner's brief, also relate to the question of whether the statutory enactments there involved were in contravention of the commerce and due process of law clauses of the Federal Constitution, such case in re-

spect to such case and other State decisions that the determination of the questions involved in the case at bar is controlled by the decisions of the Supreme Court of the United States, which are conclusive and binding upon State courts to the same extent and with like effect as are the Constitutions and Laws of the United States, anything in a State Constitution, State statutes and State decisions to the contrary notwithstanding. Consequently, the case cited and Chicago, M. & P. R. R. Co. v. Harmon, 295 Pac. 762, hereinafter considered, are not of controlling effect in the determination of such questions. In order to properly con- [fol. 209] sider such case it becomes necessary to consider the statutes involved, which were sections 80, 81, 82, 96, 101, 102, 105, 106 and 107 of the Illinois General Corporation Act of 1919 as amended. Section 80 provided that every foreign corporation, for profit, with certain exceptions, before it should transact any business or maintain an office in the State, should procure a certificate of authority therefor from the Secretary of State. Section 81 provided that foreign corporations desiring such a certificate of authority should file in the office of the Secretary of State a copy of its charter and a statement setting forth, among other things, an itemized estimate of the amount of tangible property to be employed by it in the State during the first year next after the day on which it should be licensed and begin to do business in the State; an itemized estimate of the total amount of capital to be employed by it in the State and an itemized estimate of the total amount of capital to be employed by it elsewhere during such year; an estimate of the annual business to be transacted by the corporation everywhere and an estimate of the annual business to be transacted at or from places of business in Illinois. Section 82 provided that if such statement was in conformity with law, the Secretary of State should issue a certificate of authority, setting forth, among other things, the amount of its authorized capital stock and the amount it was authorized to use in business in Illinois. Section 96 required a domestic corporation to pay an initial fee of one-twentieth of one per cent upon the amount of its authorized capital stock, in no event to be less than $20.00, and a like fee upon any subsequent increase, and in addition thereto the same fee as that required for the filing of a certificate of amendment, and provided that in the event

that the corporation had capital stock of no par value, its shares, for the purpose of fixing the fee, should be considered to be of the par value of $100.00 a share. Section 101 provided that every foreign corporation, for profit, with certain exceptions, *in addition* to the payment of the annual franchise fees and taxes provided for by section 105, should pay for its certificate of authority to do business in Illinois the same fees required to be paid by similar domestic corporations, and that every foreign corporation theretofore or thereafter admitted to do business in Illinois should pay for increases in the amount of capital stock represented in Illinois the same fees required to be paid by domestic corporations; that all such fees, however, should be based upon the *proportion of its authorized capital stock* represented by business transacted and tangible property located in Illinois, and that whenever it should appear that the amount of capital stock represented in Illinois was greater [fol. 210] than the amount theretofore paid upon by any foreign corporation, such corporation before it should *continue* to transact business in Illinois, should pay upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock, equal to the amount of such excess, and that if the foreign corporation had capital stock of no par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid, should be considered to be of the par value of $100.00 a share. Section 102 required foreign and domestic corporations to file an annual report, setting forth such facts as should be necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in the State, or such other information as might be necessary or appropriate in order to assess the annual license fee or franchise tax. Section 105 provided that every domestic and foreign corporation, for profit, with certain exceptions, required to make an annual report should pay an annual license fee or franchise tax of 5c on each $100.00 of the proportion of its capital stock represented by business transacted and property located in the State, *but in no event should the amount of such license fee or franchise tax be less than that required to be paid by section* 107 by a foreign corporation having tangible property or business in the State and in the event that the corporation had stock of no par value,

its shares, for purpose of fixing such fee, should be considered to be of the par value of $100.00 a share. Section 106 provided that in ascertaining the amount of the authorized capital stock represented by the business transacted and property located in Illinois, the sum of the business transacted in the State and the total tangible property of the corporation located within the State should be divided by the sum of the total business of the corporation and the total tangible property of the corporation wherever situated. Section 107 provided that in case it should appear from the annual report that the corporation had no tangible property located in Illinois and was transacting no business in the State, the foreign corporation should pay annually to the Secretary of the State the following fees as an annual franchise tax: All such corporations having a capital stock of $50,000.00 or less, should pay an annual fee of $10.00; corporations having a capital stock of more than $50,000.00, but not exceeding $200,000.00, should pay an annual fee of $15.00; corporations having a capital stock of more than $200,000.00, but not exceeding $500,000.00, should pay an annual fee of $20.00; corporations having a capital stock of more than $500,000.00, but not exceeding [fol. 211] $1,000,000.00, should pay an annual fee of $50.00, corporations having a capital stock of more than $1,000,000.00; but not exceeding $10,000,000.00, should pay an annual fee of $200.00; and all corporations having a capital stock in excess of $10,000,000.00, should pay an annual fee of $1,000.00, and that in the event that the corporation had stock of no par value its shares for the purpose of fixing such fee should be considered to be of the par value of $100.00 a share.

It will be observed that the Illinois statutes differed from the Virginia statutes now under consideration in that the former contained what might be called a minimum tax provision, as section 105 made applicable the provisions of section 107. Furthermore, sections 96, 101, 105, 106 and 107, of the General Corporation Act of Illinois were held to include "the whole scheme of taxation of the right of foreign corporations of every character to transact business in the State, the terms of their admission, the fees required of them and the taxes they must pay, the reports they must make and the rights they may exercise". The annual franchise tax provided for by section 105 and the

formula provided by section 106 for ascertaining the proportion of capital stock represented by business transacted and property located in Illinois were in substance the same as those found to contravene the commerce clause and due process of law clause of Federal Constitution in Air-Way Electric Applicance Corporation v. Day, supra, and consequently such invalidity rendered invalid the initial fee required to be paid for a certificate of authority to do business in Illinois and the additional fee required to be paid upon any subsequent increase of the proportion of the authorized capital stock represented by property owned and business transacted in the State, as such initial fee, additional fee and annual franchise tax, being interdependent, the unconstitutionality of the annual franchise tax necessarily invalidated such initial fee and additional fee. See Looney v. Crane, supra.

The court, while referring to Looney v. Crane, supra, decided on December 10, 1917, and International Paper Co. v. Massachusetts, supra, decided on March 4, 1918, did not refer to the General Railway Signal Company case, decided by an unanimous court on April 15, 1918, and there is nothing to indicate that had there been before it a statute similar to the Virginia statute which imposes only an entrance fee and an additional entrance fee and *does not impose any annual franchise tax,* the court would have held such a statute unconstitutional. The holding of the court to the effect that sections 101 and 106 were invalid, [fol. 212] as contravening the commerce clause and the due process of law and equal protection of the law clauses of the Federal Constitution, was justified on the grounds that such initial tax for increase in capital stock and the annual license tax were interdependent, and if based on that ground was correct. The holding to the effect that a State cannot exclude a foreign corporation engaged in interstate commerce from doing business in the State, or impose as a condition of the right to transact local business a tax or license fee on the corporation's interstate commerce, was also correct when applied to the Illinois statutes, but such holding has no application to the case now under consideration, where only an additional entrance fee, constituting part of the admission fee is involved, and no annual franchise tax is imposed by the statutes, and there is no attempt to impose as a condition

of the right to transact local business a tax or license fee on the corporation's interstate commerce or property, either in or out of the State. The holding to the effect that the statutory provisions fixing an arbitrary value of $100.00 per share on no par value stock for the purpose of computing the entrance fees and license fees of corporations, were invalid as to foreign corporations in that they were discriminatory and denied to them due process of law, was clearly erroneous and contrary to the weight of authority and to the decision of the Supreme Court of the United States in New York v. Latrobe, infra, and International Shoe Co. v. Shartel, infra, and State v. Margay Oil Corp., infra. Analyzing the statutes involved in the Illinois case, it will be seen that they differ materially from the Virginia statutes now under consideration, and while the Illinois case at first blush might seem to have some bearing upon the questions here involved, it will be seen that it in no wise destroys the controlling effect of the General Railway Signal Company case, and that it has no weight in the consideration of the questions involved in the case at bar. Its erroneous conclusions in respect to the assignment of an arbitrary value to non-par shares rendering the Illinois statutes violative of the equal protection clause of the Federal Constitution will be hereinafter considered.

The attention of the Commission has been called to Chicago, M. & St. P. Railroad Co. v. Harmon, 295 Pac. 762, decided on January 17, 1931, by the Supreme Court of Montana, and which it is claimed supports the contention that the entrance fee and the additional entrance fee imposed by the Virginia statutes are unconstitutional as constituting a burden upon interstate commerce and taking property without due process of law. The railroad company, having paid under protest certain fees, demanded of [fol. 213] it by the Secretary of State upon the filing of its first annual report, as required by law, brought action to recover the amount so paid. Such fees were demanded pursuant to the provisions of chapter 95, Laws of Mont. 1925, which are in part as follows:

"Section 1. Every foreign corporation required by law to file in the office of the Secretary of State a certified copy of its charter or articles of incorporation shall pay to the Secretary of State for the filing thereof as follows:

Upon the proportion of its authorized capital stock then or thereafter to be represented by its property and business in Montana at the rate of $1 per $1,000 for the first $100,000; at the rate of 80¢ per $1,000 for any additional from $100,000 to $250,000; at the rate of 60¢ per $1,000 for any additional from $250,000 to $500,000; at the rate of 40¢ per $1,000 for any additional from $500,000 to $1,000,000; and at the rate of 20¢ per $1,000 for any additional over $1,000,000, provided, however, that no fee for filing shall be less than $50.

"Section 2. Every foreign corporation which is required by law to file in the office of the Secretary of State a certified copy of its charter or articles of incorporation shall annually and between the first days of January and March of each year file in said office a report * * * stating the proportion of its authorized capital stock represented in the State of Montana by its property located and business transacted therein during the preceding year.

"Section 3. In determining the proportion of authorized capital stock employed in this State the same shall be computed by taking the gross business in dollars of the corporation in the State for the preceding year and adding the same to the full value in dollars of the property of the corporation located in the State and by taking the total gross business in dollars of the corporation, both within and without the State for the preceding year, and adding thereto the full in dollars of the entire property of the corporation both within and without the State and by then dividing the total value in dollars of the business and property in the State by the total value in dollars of all the business and property of the corporation, the quotient thus obtained to be as the percentage of the authorized capital stock represented by the business and property within the State. * * *

"Section 4. Whenever such report shall show a greater proportion of the authorized capital stock * * * represented by its property and business in Montana than that upon which the fee for filing was based, such foreign cor- [fol. 214] poration at the time of filing such report, shall pay such additional fee as it would have been required to pay for filing if such fee had been calculated on the basis

of the proportion of the authorized capital stock represented by its business and property in Montana as shown by such report."

It will be observed that the Montana statute provided for a minimum fee instead of a maximum fee; that the fee was based upon the proportion of its authorized capital stock represented by its property and business in the State; that whenever the annual report required to be made showed an increase in such proportion an additional fee based upon such increased proportion was required to be paid. For the determination of the amount of the fees to be paid when the corporation filed its charter or when its annual report showed an increase in the proportion, its entire business including its interstate business transacted and property owned in Montana was divided by the total of all its business including its interstate business and property, and that percentage was applied to the authorized shares, and the resulting amount used as the basis for determining either the original filing fee or the additional filing fee. While the amount of the charge depended on the relation each to the others of the various elements employed in the calculation, the fee imposed might directly depend upon the amount of the corporation's interstate transactions. In the computation of the fee interstate business done both in and out of the State was a factor, and the exaction imposed as a filing fee or additional fee would increase if the interstate business in Montana increased, while the business outside of Montana remained stationary or declined. The court did not pass upon the nature of the "additional fee" to be computed and exacted whenever an annual report of a corporation doing business in the State showed an increase in property owned and business done within the State, saying:

"It differs from the ordinary franchise or annual tax, in that it is added to the original 'entrance fee' and is in the nature of a condition subsequent imposed upon a foreign corporation at the time of its entry, which may or may not thereafter attach. However, we deem it unnecessary here to determine whether the fee exacted is to be classed as an entrance fee, a franchise fee or an annual fee."

It would seem that the decision was largely controlled by the peculiar facts involved and circumstances attendant

[fol. 215] upon the organization and operations of the corporation. The facts involved in the case do not plainly appear in the opinion, but in Poor's 1927 and 1928 Manuals, Railroad Section, which is a recognized authority on the subject, it appears that for many years prior to March 18, 1925, the Chicago, Milwaukee and St. Paul *Railway* Company was a completed railway line, extending from Chicago to Seattle, fully equipped, and had been operated for many years as one of the great trunk lines of the United States, its main line extending through Montana and branch lines extending from such main line to various points in that State, and that for many years prior to its being placed in the hands of receivers by the United States District Court for the Northern District of Illinois on March 18, 1925, it had been engaged in interstate business in many States, including Montana, and also in local business in Montana, inseparably interwoven and connected, the same property and the same instrumentalities being used in the conduct of both the interstate business carried on in Montana and other States and the local business carried on in Montana and elsewhere. A reorganization plan was formulated and on November 22, 1926, the properties of the railway company were purchased by representatives of the reorganization managers, and on January 19, 1927, the District Court entered a decree approving the reorganization plan. The Chicago, Milwaukee, St. Paul and Pacific *Railroad* Company was incorporated on March 31, 1927, in Wisconsin, for the *purpose* of acquiring and operating the lines of railroad and other properties formerly owned by the Chicago, Milwaukee and St. Paul *Railway* Company and which had been so purchased. Its formation was a part of and in pursuance of the plan of reorganization. In June, 1927, the Wisconsin corporation filed a certified copy of its articles of incorporation in the office of the Secretary of State of Montana and paid a filing fee of $50.00. Its authorized capital stock consisted of 2,923,804 shares of preferred stock of a par value of $100.00 each and 2,097,971 of common stock of no par value. At the time of filing its articles the corporation owned no property in and was transacting no business within the State of Montana, so only the minimum fee of $50.00 was required to be paid, but on January 13, 1928, it acquired the property so purchased from the receivers and thereafter operated the railway and engaged in both interstate and intrastate business within Mon-

tana to the same extent as had the railway company to whose property and franchises it had succeeded. In February, 1929, it filed its first annual report, as required by chapter 95, Laws of 1925, above quoted, showing that its authorized capital stock was, as above stated; that there [fol. 216] were issued and outstanding certificates of stock representing 1,191,750 shares of the preferred stock valued at $100.00 a share, and 1,184,060 shares of common stock valued at $1.00 a share, and that the proportion of the capital stock employed in Montana, computed in accordance with the provisions of section 3 of the act, was 9.29 per cent thereof which resulted in a fee of $7,705.57. The court held that the Act of 1925 contravened the commerce and due process of law clauses of the Federal Constitution, and that, being void, it did not repeal Laws Montana 1923, c. 132, which designated as the basis, both for the initial fee and the fee covering an increase, the proportion of the capital stock (not "authorized capital stock", but issued capital stock) represented by the property and business in Montana, and held that capital stock as the prime basis of the tax, and for the purposes of the tax under the Act of 1923, meant "value of capital stock, that is net assets value". After some irrelevant observations, the court said:

"In Corpus Juris it is said: 'Only two exceptions or qualifications have been attached to the power of a State to exclude foreign corporations from coming into the State and doing business there. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce * * * the other * * * where the corporation is an agency or instrumentality in the employment of the Federal government'. 14-a C. J. 1248.

"As Congress is vested with the power to regulate interstate commerce, a corporation authorized on its creation to engage in such commerce cannot be excluded from another State than that of its creation; nor may a State in any way tax, regulate, or restrict the operations or instrumentalities of such a corporation where to do so would amount to a direct burden upon interstate commerce. Looney v. Crane Co., (245 U. S. 178, 62 L. Ed. 230). Further, the right to exclude or regulate does not extend to support a statute which, in its operation, deprives a foreign corporation of

its property without due process of law. * * * These qualifications, of course, do not affect the right of the State to impose upon a foreign corporation, for the privilege of entering the State for business purposes, an entrance fee based on the local or intrastate business *it may thereafter do, or an excise tax based on such business,* provided the law does not lay a burden on the interstate business of the corporation or seek to tax property lying without the State."

[fol. 217] After discussing a former statute making provision only for an entrance fee to be paid by all corporations, domestic or foreign, filing articles of incorporation with the Secretary of State, based upon the amount of authorized capital stock shown in the articles filed and similar fees to be paid on filing certificates of increase, and certain decisions of the Supreme Court of Montana holding such statute "invalid as to foreign corporations engaged in interstate and intrastate business and having only a portion of its capital stock represented by property owned and business done in the State, the basis of the decision being the contravention of the commerce and due process of law clauses of the Federal Constitution." J. I. Case Co. v. Stewart, 60 Mont. 380, 199 Pac. 909, 911; General Electric Co. v. Stewart, 60 Mont. 387, 199 Pac. 911, the court said:

"This latest pronouncement of our court is in accord with the later decisions of the United States Supreme Court, in which the Baltic Mining Company opinion has now been definitely disapproved in so far as it 'tends to support a different view'. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 69 L. Ed. 916; Cudahy Packing Co. v. Hinkle, 278 U. S. 461, 73 L. Ed. 454. Not only our decision, but this latest Federal decision, was written concerning acts providing for the so-called 'entrance fee', computed on capital stock, without regard to the proportion of property owned, or business done, by the foreign corporation, in the State. Therefore, while the equal protection clause of the Federal Constitution may not be a bar to the laying of this class of tax, clearly the due process clause and the commerce clause thereof forbid the exaction of a fee for the privilege of entering the State for the purpose of transacting local business if the act either imposes

a burden on interstate commerce or seeks to tax property beyond the confines or jurisdiction of the State.

"It has been held that, although the total capital stock is made the basis for computing the entrance fee, the validity of the act is saved when the prescribed fees do not vary in direct proportion to the amount of capital stock and a maximum fee is fixed, which the court cannot say is 'wholly arbitrary or unreasonable'. General Railway Signal Co. v. Virginia, 246 U. S. 500, 38 S. Ct. 360, 361, 62 L. Ed. 854. However, the decision is based, in part, on the Baltic Mining Company decision, and the court stated: 'It seems proper, however, to add that the case is on the border line. See Looney v. Crane Co., 245 U. S. 178, 38 S. Ct. 85, 62 L. Ed. 230; International Paper Co. v. Massachusetts, 246 [fol. 218] U. S. 135, 38 S. Ct. 292, 62 L. Ed. 624, (Ann. Cas. 1918-c, 617), and Locomobile Co. v. Massachusetts, 246 U. S. 146, 38 S. Ct. 298, 62 L. Ed. 631'.

"In considering a Washington statute providing for *both* a filing fee and a license tax 'reckoned' upon its authorized capital stock, as here, the fact that the statute fixed a maximum fee was brushed aside and the act declared violative of the commerce clause; the court declaring 'the amount demanded is unimportant when there is no legitimate basis for the *tax*'. Cudahy Packing Co. v. Hinkle, above. * * *

"Up to 1924 the State of Ohio had statutory provisions on this subject very similar to those of chapter 95, Laws of 1925, above; these provided for an initial fee to be paid on entering the State, annual reports, and for the payment of an 'annual fee' for the privilege of exercising its franchise in the State 'in addition to the initial fee * * * computed upon the proportion of its authorized capital stock of the corporation represented by the property owned and used and business transacted in this State'. Applying the above-quoted declarations in condemning the Ohio law, the Supreme Court of the United States said: 'The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge * * * exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state.'. Air-Way Corp. v. Day, 266 U. S. 71, 69 L. Ed. 169.

"It is true that the tax under consideration in the last case cited was an annual or franchise tax, and therefore the opinion was finally based on a violation of the equal protection clause of the Constitution, but what is there said concerning the violation of the commerce clause is in harmony with the declarations found in the decisions heretofore considered, dealing with the initial or entrance fee, and is applicable here."

We are at a loss to determine upon what grounds the court based its conclusions. A considerable portion of the language of the opinion consist of obiter dicta. If it intended to hold that because a foreign corporation is authorized on its creation to engage in interstate commerce or is engaged in such commerce, that fact of itself would exempt it from the control of the State with respect to its strictly intrastate business, such holding was clearly erroneous. Apparently it based such statement upon the matter quoted [fol. 219] from 14-a C. J. 1248. It would probably not have fallen into this error, if it had observed that on page 1254 of 14-a C. J., it was said:

"But the mere fact that a corporation is engaged in interstate or foreign commerce does not exempt it from the control of the State with respect to its strictly intrastate business which may be prohibited, taxed, or regulated in accordance with the rules applicable to any other foreign corporation. * * *"

Were such statements of the Montana court sound, a corporation by merely inserting in its charter a clause authorizing it to engage in interstate business would be able to secure immunity from State regulation even though it was not engaged and never proposed to engage in interstate business, and a like immunity would be obtained by a corporation authorized to engage in such commerce by engaging in interstate commerce. The unsoundness of these conditions has been heretofore pointed out. See Sunlight Produce Co. v. State, (Ark.) 35 S. W. (2d) 342. Immediately following this erroneous statement, the court apparently upheld "the right of the State to impose upon a foreign corporation for the privilege of entering the State for business purposes, an entrance fee based on the local business or intrastate business *it may thereafter do,* or an

excise tax based on such business, provided the law does not lay a burden on the interstate business of the corporation or seek to tax property lying without the state", and cited in support of this proposition, Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, and Postal Tel. Co. v. Charleston, 153 U. S. 692, 38 L. Ed. 871. Neither of these cases intimate in any way that in order to be valid the entrance fee imposed upon a foreign corporation for the privilege of entering the State to do local business must be based on the local or intrastate business that the corporation may *thereafter* do and we have been cited to and have been able to find no case so holding. Whether the Montana court intended to hold that the General Ry. Signal Company case has been overruled by the Cudahy Packing Co., the International Paper Co., and Air-Way Electric Appliance Company cases does not definitely appear, but these latter cases have elsewhere been distinguished from the General Ry. Signal Company case, and if the court intended to so hold, it was plainly in error. The court, in holding the statute invalid, based its decision upon the *alleged* fact that the Baltic Mining Company case has been overruled. As has been elsewhere pointed out, this is not true. The previous decisions of the Montana court on the [fol. 220] question of the validity of an entrance fee required to be paid by foreign corporations show a remarkably inconstancy of opinion. These cases were based upon a previous statute of Montana—section 165 of R. S. Mont. 1907, which read in part as follows:

"The Secretary of State * * * must charge and collect the following fees: * * * IV. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged: Amounts up to $100,000, 50c per thousand; additional from $100,000 to $250,000, 30c per thousand; additional from $500,000 to $1,000,000, 20c per thousand; additional over $1,000,000, 10c per thousand, providing that no fee for filing any articles of incorporation or increase of capital stock shall be less than $20. * * * X. For filing each certified copy of charter or articles of incorporation of any foreign corporation, the same fees shall be charged as is provided for in Article IV of this section for domestic corporations."

It will be observed that the fee imposed by such statute was graduated in proportion to the authorized capital stock, but that there was no fixed maximum. In 1913, in Chicago, M. & St. P. Ry. Co. v. Swindlehurst, 47 Mont. 119, 130 Pac. 966, it was held that said section 165 was invalid in so far as it affected foreign corporations engaged in interstate commerce as violating both the commerce clause and the due process clause of the Federal Constitution. The Chicago, M. & St. Paul *Railway* Company, which was the predecessor of the Chicago, M. & St. Paul Railroad Co., was engaged in the operation of its railroad, as a common carrier of passengers and freight in and through certain States, and desiring to acquire and operate a certain railroad running through Montana and other States, filed its articles of incorporation in Montana. The court held that the case came within the direct purview of Western U. Teleg. Co. v. Kansas, and that the fee could not be imposed. Later in State v. Alderson, 49 Mont. 29, 140 Pac. 82, the court, relying upon the decision in the Baltic Mining Company Case, held that Chicago, M. & St. P. Railway Co. v. Swindlehurst, supra, did not prevent the Secretary of State from insisting on the payment of a fee for recording and filing the certificate of a foreign corporation intending to engage solely in private intrastate business, and that such section 165 applied only to foreign corporations seeking to conduct strictly private intrastate business and not to foreign corporations seeking to engage in interstate commerce in the State, saying:

[fol. 221] "To have been technically exact, we should have said in the Swindlehurst Case that section 165 does not have any application to foreign corporations seeking to engage in interstate commerce in this State. This is our holding, and, thus stated the statute is left intact to apply to foreign corporations over which this State has the right to exercise *some degree of regulation or control.*" (Italics ours.)

Later, in J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380, 199 Pac. 911, and General Electric Co. v. Stewart, 60 Mont. 387, 199 Pac. 911, the court again considered the validity of section 165 and held that its conclusion in State v. Alderson, supra, to the effect that such

section 165 might be enforced against a foreign corporation engaged in intrastate business in the State, although but a small percentage of its capital stock was represented by the business transacted in the State, was based upon the decision in the Baltic Mining Company Case, which in the Alderson Case was thought to overrule Western U. Teleg. Co. v. Kansas, supra, but which was held in Looney v. Crane, 245 U. S. 178, 62 L. Ed. 230, not to have been the case. The Montana court held that inasmuch as section 165 required the Secretary of State to collect upon the filing of its certificate of increase of capital stock, specified fees in the proportion to the total amount of authorized capital stock without *providing any reasonable maximum charge to be imposed without reference to the total capital stock, it was invalid as applied to a foreign corporation* employing only a portion of its capital stock within the State as in violation of the due process clause of the Federal Constitution, and where the corporation was engaged in interstate commerce, in whole or in part, as in violation of the commerce clause of the Federal Constitution, and that such section also violated the due process clause as applied to a foreign corporation, only a small part of whose capital stock was represented by property owned and business transacted within the State, though all of its business within the State was intrastate. This conclusion, however, was based upon the fact that section 165 did not provide for any reasonable maximum charge to be imposed without reference to the total capital stock, the court saying:

"A statute may escape condemnation if it imposes the tax only upon the proportion of the total capital stock represented by the property and business in the State imposing the tax, *or if it provides a reasonable maximum charge to be imposed without reference to the total capital stock.*" (Italics ours.)

[fol. 222] If the statute had provided for a reasonable maximum charge to be imposed without reference to the *total* capital stock, apparently in the case last cited it would have been held that the statute was not in contravention of the commerce and due process of law clauses of the Federal Constitution. The decision in Chicago, M. & St. P. R. R. Co. v. Harmon, that the Act of 1925 was invalid was unquestionably largely controlled by the fact that the railroad corporation involved was formed to acquire and ope-

rate a railroad which for many years prior to its acquisition had been used in interstate and intrastate business, which two classes of business were inseparably connected, the same roadbed and the same agencies and instrumentalities being used in carrying on the two classes of business, and that the additional fee was based, in part, on the operations of the railroad company in which interstate business and property located out of the State were factors, and that the statute did not provide a reasonable maximum charge to be imposed without reference to the total capital stock. Had there been involved a statute providing for a reasonable maximum charge to be imposed without reference to the *total* capital stock and a charge which did not vary in direct proportion to the maximum authorized capital stock, it is not believed that the Supreme Court of Montana in Chicago, M., St. Paul and P. R. R. Co. v. Harmon, supra, would have held such a statute invalid, in view of its holding in J. I. Case Threshing Machine Co. v. Stewart, supra. The illogical and erroneous dicta of the Montana court in the case now being considered resulted from its failure to draw a distinction between a true admission fee and a tax—a distinction pointed out by Mr. Chief Justice Taft in the Hanover Fire Insurance Company Case and suggested by Mr. Justice Stone in New York v. Latrobe, 279 U. S. 421, 73 L. Ed. 776, and from the misapplication of cases based on facts and statutes materially different from those under consideration. The Harmon case, assuming the correctness of the conclusion as distinguished from the reasoning and dicta in the opinion, is distinguishable from General Railway Signal Company Case, both as to the terms and character of the laws involved and as to the facts, and the same distinctions are applicable as between the Harmon case and the instant case. The fees under consideration in the Harmon case were only theoretically entrance and additional entrance fees. They involved in their *practical operation* a property tax since the basis of the so-called entrance fees was primarily, both by the terms of the law and by practical operation, *property* and *business* located and done in Montana, [fol. 223] but the fees were "stepped up" to the purely arbitrary basis of the authorized capital stock, regardless of whether issued or unissued and regardless of what the stock was issued for and regardless of the value of the issued stock at the time of levying such

so-called entrance or additional entrance fee. In other words, starting out as a property tax and based upon property and business in Montana, such initial basis is immediately departed from and the computation is upon a proportion of *potential* and not *actual* financial structure or set-up. There existed, therefore, the potentiality of a great burden on interstate commerce, inequality, and taxation of *property* beyond the jurisdiction of the taxing power. The Montana statute has the same vice as that in the Air-Ways and Cudahy Cases and would doubtless have been declared unconstitutional by the United States Supreme Court if the Montana court had not anticipated such action, and a holding by the United States Supreme Court that the Montana statute involved in the Harmon Case was unconstitutional could have been had, and doubtless would have been rendered, without overruling or in any way impairing the decision in the General Railway Signal Company case. In all of the features just mentioned, as in many others previously pointed out, the Virginia statute is, as stated, obviously distinguishable. The decision in the Harmon Case, as previously pointed out, might well have been based upon the fact that it involved taxation upon an instrumentality of commerce and upon inseparably intermingled interstate and intrastate business by such instrumentality of interstate commerce, the protesting railroad company, which was to all intents and purposes the successor of the predecessor railroad company which had been operating in Montana for a long period of time. It may be further pointed out, amongst other striking distinctions between the Montana and the Virginia laws, that the Montana law was, to all intents and purposes, a recurrent property tax in that it might be increased not only because of increase as to the ratio of the property and business in Montana to the property and business everywhere, but also whenever the *authorized* capital stock should be increased though the ratio remained the same. In other words, when there was a proportionate increase of business and/or property in Montana there would be an increased tax to be paid by virtue of the increased ratio to the *authorized* capital stock, and there would be an *increase* in the *amount* of tax collectable when there was an increase in authorized capital stock notwithstanding there was no change in ratio as to the primary basis of the tax, namely, the property and business located and done in Mon-

[fol. 224] tana. Under the Virginia statute, as has been previously pointed out, either as to the initial or additional entrance fee, property is never taken into purview, and business done in or out of the State is entirely immaterial. Consequently the Virginia fee is, theoretically and in its practical operation and in all of its aspects, a strict entrance or privilege fee and is payable as a condition precedent to the enjoyment, and the continued enjoyment, of the privilege to do *intrastate* business. The Virginia statute takes into purview, both as to the initial entrance fee and as to the additional entrance fee if and when any shall ever become payable, the *potential magnitude* of the corporate entity seeking to obtain the privilege of conducting intrastate business, and the fee is graduated, with a maximum to keep it within reasonable bounds, according to such *potential magnitude*, and present and future *actual* financial strength and *actual* extent and kinds of business are utterly ignored.

There is nothing in any of the Federal cases to indicate that the General Railway Signal Company Case has been overruled. It was recognized as binding authority by the Supreme Court of the United States in Western Gas Construction Co. v. Virginia, 267 U. S. 597, 72 L. Ed. 723, decided on March 5, 1928, which affirmed Western Gas Construction Co. v. Commonwealth, 147 Va. 235, 136 S. E. 646, on the authority of the General Railway Signal Co. Case. It was quoted with approval in St. Louis, Southwestern Ry. Co. v. Emmerson, 27 Fed. (2d) 1005, decided on May 13, 1928, by the District Court for the Southern District of Illinois, where the question involved was the validity of an annual franchise tax assessed under sections 105 and 107 of the General Corporation Act of Illinois, as amended by Laws Ill. 1927, p. 354. Although the decision of the lower court was reversed by the Circuit Court of Appeals for the Seventh Circuit in St. Louis, Southwestern Ry. Co. v. Emmerson, 30 Fed. (2d) 322, decided on February 21, 1929, on the ground that when sections 105 and 107 were construed together the annual franchise tax was invalid as imposing a burden on the basis of the total capitalization of the foreign corporation, including property outside the State, the court, in referring to the General Railway Signal Co. Case, recognized the distinction between imposing a charge upon a foreign corporation seeking to enter the State to do local business and the imposition of an annual tax or license fee

for the right to continue to do business in the State. It may be observed that the decision of the Circuit Court of Appeals was reversed by the Supreme Court of the United States in Stratton v. St. Louis, Southwestern Ry. Co., 282 U. S. 440, 75 L. Ed., reported in Lawyer's Co-op. Pub. Adv. [fol. 225] Sheets (75 L. Ed.), No. 2, p. 71, on the ground that the matter should have been determined by a three-judge court in accordance with the requirements of the Judicial Code (U. S. C., Title 28, Sec. 380), and that upon the remandment of the case to the Circuit Court of Appeals, pursuant to the decision of the Supreme Court, the appeal to the Circuit Court of Appeals was dismissed and thereupon the District Court, with three judges sitting, heard the plaintiff's application for a preliminary injunction against the enforcement of the annual franchise tax and dismissed the bill for want of equity, stating that the question involved had been definitely settled by the decision in the Cudahy Packing Company Case, which the court said involved a statute "in all essential respects like the one under consideration and that a similar *tax* was there sought to be imposed and was held to be constitutional." The General Railway Signal Company case was not mentioned in the opinion of the District Court which was rendered on March 7, 1931, and reported in the United States Daily on March 16, 1931. The charge complained of in the latter case was not an initial entrance fee or an additional fee, but a *franchise tax,* and the statutes under which it was imposed prescribed no maximum, but instead prescribed a minimum fee.

There are certain well established rules respecting the validity of State laws challenged under the commerce clause of the Federal Constitution, which should be borne in mind in considering whether or not the Virginia statutes violate the commerce clause. Two of such rules were stated in Shafer v. Farmers Grain Co., 268 U. S. 189, 199, 69 L. Ed. 909, 915, where Mr. Justice Van Devanter, delivering the opinion of the court, said:

"The decisions of this court respecting the validity of State laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here,—one, that a State statute enacted for admissible State purposes, and which affects interstate commerce *only incidentally and remotely,*

is not a prohibited State regulation in the sense of that clause; and the other, that a State statute which, by its *necessary operation, directly interferes with or burdens such commerce,* is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. • • • These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a State statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. [fol. 226] Otherwise the course of adjudication has been consistent and uniform." (Italics ours.)

Where a charge imposed by a State upon a foreign corporation for the privilege of doing local business therein does not directly interfere with interstate commerce, but affects such commerce only incidentally and remotely, it is not a prohibited State regulation within the meaning of the commerce clause of the Federal Constitution. To warrant interference with the exercise of the taxing power of the State on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is *direct and substantial and not merely incidental or fortuitous.* Western Cartridge Co. v. Emmerson, 281 U. S. 511, 515, 74 L. Ed. 1004, following Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 66 L. Ed. 622, and distinguishing Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. Ed. 169.

In Hump Hairpin Manufacturing Co. v. Emmerson, supra, Mr. Justice Clarke, delivering the opinion of the court, said:

"While a State may not use its taxing power to regulate or burden interstate commerce • • • on the other hand it is settled that a State excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. Maine

v. Grand Trunk R. Co. 142 U. S. 217, 35 L. Ed. 994, * * *. The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect, it. * * * *If this same amount of tax had been imposed upon such a manufacturing corporation as we have here, without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of.* 140 U. S., supra, p. 229." (Italics ours.)

[fol. 227] It is not the power to engage in interstate or foreign commerce but only the actual carrying on of such commerce, that is protected against State regulation. See Cooley on Taxation (4th Ed.), section 373, citing Honduras Commercial Co. v. State Board of Assessors, 54 N. J. L. 278, 23 Atl. 668, where it was held that a State tax upon a foreign corporation having power to engage in foreign or interstate commerce is not invalid unless the corporation is actually engaged in such commerce. See also Sun Light Produce Co. v. State (Ark.), 35 S. W. (2d) 342, which has heretofore been quoted. When a foreign corporation applies for a certificate of authority to do intrastate business in Virginia, presumably it has never done any intrastate business therein—certainly not legally—and any business that it has lawfully done, in Virginia, must have been interstate business, and it may never do any intrastate business nor own any property in Virginia. It has simply secured the *privilege* of doing intrastate business, which privilege it may surrender at its will as provided by section 3848, Code 1919. The fees imposed by the Virginia statutes bear no relation to its business anywhere, present or future, or to the property owned, or which may be owned, in Virginia or elsewhere. Neither the process of securing a license nor of the continuance of the privilege involves any disclosures along these lines. It may not have any business or property of any kind anywhere, and may never have any. Such facts are immaterial.

On the other hand, it may have extensive interstate business both in and out of Virginia, and so long as it does not

transact any intrastate business, it will not need any license, and its activities in Virginia will not contravene any Virginia law. The fees exacted upon entrance and upon increases of authorized capital stock and continuance of the privilege to transact intrastate business, commensurate with the potential size of the corporation and payable once and for all time, cannot, in the nature of things, burden interstate commerce, because such commerce, to any extent and exclusive of any intrastate business, may be entered upon and carried on in Virginia without securing a license under section 3847, Code of 1919. Neither can the entrance fee be a tax on property located outside of the State because it bears no relation to property owned or which may be owned anywhere. The entrance fee is strictly on a "pay as you enter" basis.

It may be observed that some of the decisions of the United States Supreme Court hereinbefore considered, and followed as a matter of duty by some of the State courts, seem to wholly disregard the difference between property [fol. 228] and excise taxes and to preclude the computation of an excise tax on all the capital stock of a foreign corporation, part of whose property is not employed in the State, on the theory that it constitutes taxation of property located outside the State. While it may seem presumptuous to question the decisions of the highest court in the land, yet it would seem that it has departed from the fundamental rule distinguishing property and excise taxes. If a tax on capital stock be deemed a property tax, then of course the taxation of all the capital stock, where a part of the capital is not located or employed in the State, would be an exact equivalent of taxing tangible property of a corporation located outside of the State and would without question violate the due process clause of the Federal Constitution. However, the Supreme Court of the United States founds its decisions on no such grounds, as the taxes involved in such decisions were undoubtedly excises rather than property taxes, and the only justification for the decisions is that the main question considered therein was interference with interstate commerce and what is held as to extraterritorial taxation is merely incidental thereto. The fees charged a foreign corporation for the privilege of entering the State

of Virginia for the purpose of doing local business within the State and for the continuance of such privilege are not a property tax, but an excise charge, and the apparent conflicting and contradictory statements, and, it might be added in some instances, the apparently erroneous conclusions which have been reached by the United States Supreme Court, are directly attributable to the failure of the court to recognize this distinction.

In Cooley on Taxation (4th Ed.), Sec. 858, it is said:

"Excise, as distinguished from property, taxes on franchises of a corporation are provided for in most of the States, and are within the power of the legislature to impose. Such excise taxes generally take the form of (1) organization or incorporation fees or taxes, (2) excise taxes levied periodically upon the franchises of domestic corporations, (3) *excises charged foreign corporations for the privilege of entering and doing business within the State.*" (Italics ours.)

"The extent of an excise tax imposed on domestic or foreign corporations is entirely within the discretion of the taxing power." Cooley on Taxation (4th Ed.), section 860; Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 592, 58 L. Ed. 737, 746.

[fol. 229] In Ohio River & W. R. Co. v. Dittey, supra, Mr. Justice Pitney said:

"The tax is, however, in substance, as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the State legislature."

In Maine v. Grand Trunk R. R. Co., 142 U. S. 217, 35 L. Ed. 994, quoted with approval by the Supreme Court of the United States in International Shoe Co. v. Shartel, 279 U. S. 429, 73 L. Ed. 781, it was held that a State can levy an excise tax upon a foreign railroad corporation for the privilege of exercising its franchises within the State, and that the character of an excise tax levied on a railroad corporation, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payments. Mr. Justice Field, delivering the opinion of the court, said:

"The tax for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. * * * The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and a subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. *As the granting of the privilege rests entirely in the discretion of the State,* whether the corporation be of domestic or *foreign* origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, *of a specific sum,* or may apportion the amount exacted according to the value of the business *permitted,* as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment." (Italics ours.)

It is suggested by the petitioner that the assignment by the statute to non-par-value stock of the arbitrary valuation of $100.00 a share for the purpose of ascertaining the entrance fees required to be paid by a foreign corporation would push the General Railway Signal Case over "the border line" and into the classification of Looney v. Crane [fol. 230] and other cases relied upon by the petitioner, and cause such statutes to be in contravention of the commerce and due process of law clauses of the Federal Constitution. The propriety of assigning to non-par stock such arbitrary valuation and the classification of corporations issuing par value stock and non-par value stock will be hereinafter discussed in the consideration of whether or not the Virginia statutes violate the equal protection clause of the Federal Constitution. Such contention of the petitioner is untenable. If a state has a right to impose such entrance fees, and they do not contravene such commerce and due process of law clauses when based on the par value of the maximum authorized capital stock, they are not rendered unconstitutional on account of the assignment to non-par shares of such arbitrary valuation. The assignment to shares of non-par stock value in excess of their present worth does not

operate to tax property or business without the State. Giving to the shares a specified value by which the charge is measured, only affects the *amount* of the charge *and does not give the statute an extraterritorial effect,* and such a charge cannot be said to reach the property of the corporation without the State. Neither is interstate commerce affected by the increased charge resulting from such arbitrary valuation of such shares, if the charge when based upon the par value of shares is not in contravention of the commerce clause, for giving the non-par shares a specified value only affects the amount of the charge, and not the right to impose it.

In International Shoe Co. v. Shartel, 279 U. S. 429, 73 L. Ed. 781, Mr. Justice Stone, delivering the opinion of the court, said:

"The assignment to the shares of a value in excess of their present worth or of the present value of the assets within the States does not operate to tax property or business without the State. The tax is a privilege and not a property tax. Giving to the shares a specified value by which the tax is measured, only affects the rate of tax on the privilege and does not give the statute an extra-territorial effect."

The entrance fees, consisting of the initial entrance fee and the additional entrance fee imposed by the Virginia statutes have no relation to any business which the foreign corporation may have done out of the State or any property which it may own or use outside of the State, and they cannot be said in any way to burden or interfere with interstate commerce, and it is not a disguised attempt to tax [fol. 231] interstate commerce. It constitutes an excise charge which does not affect such commerce directly, but if at all only incidentally and remotely. The interstate business of the foreign corporation is not used as a factor in the process of determining the amount of the fee. In its incidence the fee does not affect interstate commerce so directly and immediately as to amount to a general and substantial regulation of or restraint upon interstate commerce and it is not subject to any objection on the score that the State is using its taxing power to regulate or burden interstate commerce. Neither does it impose a tax upon property outside the State and thus violate the due process of law

clause of the Federal Constitution. Property within or without the State is in no wise an element in arriving at the fees imposed by such statutes as a condition of admitting the foreign corporation to quasi-citizenship and to equal rights with the citizens of the State.

I am of the opinion, that sections 207 and 208 of the Tax Code and section 5 of chapter 48 of the Acts of 1119 are not invalid as directly burdening or interfering with interstate commerce or as imposing a tax upon property beyond the jurisdiction of the State and that the imposition of the initial entrance fee and/or the additional entrance fee (which latter fee the petitioner seeks to recover) does not violate the commerce or the due-process-of-law clauses of the Federal Constitution.

The petitioner, however, cannot successfully maintain its contention that the additional entrance fee constitutes a taking of property without due process, even though such entrance fee should be held to be a tax instead of a true admission fee. While it is true that the non-par stock of the petitioner was paid for at the rate of $5.00 a share, yet in the stipulation above referred to, it was "stipulated on behalf of the Commonwealth that stock of no par value in so far as desired to be used or relied upon as a fact must be proven in regular course, and there is nothing in the record in the case at bar to indicate the market or other value of such stock and, therefore, no foundation is laid for assailing the additional entrance fee so excessive as to be a denial of due-process-of-law.

In International Shoe Co. v. Shartel, 279 U. S. 429, 73 L. Ed. 781, it was held that no foundation is laid for assailing a franchise tax assessed by assigning an arbitrary value to shares of stock without par value as so excessive as to be a taking without due-process-of-law where the market value [fol. 232] of such stock does not appear. Mr. Justice Stone, who delivered the opinion of the court, said:

"The market value of appellant's stock does not appear and no foundation is laid for assailing the tax as so excessive as to be a denial of due process of law."

(3) *As to the contention that the Virginia statutes imposing the initial entrance fee and additional entrance fee, which together constitute the entrance fee required as a condition of procuring the certificate of authority to do in-*

trastate business, contravene the equal protection clause of the 14th Amendment to the Federal Constitution.

The petitioner asserts that the Virginia statutes involved in the consideration of the case at bar contravene the equal protection clause of the 14th Amendment to the Federal Constitution, and quotes from Airway Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. Ed. 169, and O'Gara Coal Co. v. Emmerson, 326 Ill. 18, 156 N. E. 814, where such constitutional question was considered. In the determination of whether the imposition of such fees violates the equal protection clause, no question arises in respect to whether or not the statute authorizing such imposition violates the commerce clause or the due process of law clause of the Federal Constitution, but the only question involved is whether or not there is any discrimination between (1) domestic corporations and foreign corporations seeking to procure a certificate of authority to do business in Virginia or else increasing their capital stock after having procured such certificate of authority, and (2) between foreign corporations seeking to procure such certificate of authority or else so increasing their capital stock. As has been heretofore stated, the initial entrance fee and/or the additional entrance fee are not taxes, but constitute the admission fee which the foreign corporation must pay in order to become a quasi-citizen of the State and entitled to equal privileges with the citizens of the State. *Prior to its having secured this right of quasi-citizenship, the foreign corporation cannot complain that it is deprived of the equal protection of the laws.* However, after the corporation has entered the State and acquired the right to do intrastate business therein by compliance with the conditions imposed by its laws in respect to securing the right to do intrastate business, a different question arises, and a foreign corporation may in certain instances invoke the equal protection clause of the 14th Amendment.

[fol. 233] The charter fees imposed by sections 206 and 208 of the Tax Code on domestic corporations do not vary in direct proportion to the authorized capital stock and have a fixed maximum. They are similar to those imposed upon foreign corporations by sections 207 and 208 of the Tax Code, save that they are lower in amount. Such statutes differ from the statutes involved in the Air-Way Electric Appliance Corporation and O'Gara Coal Co. cases. If

the entrance fee and additional entrance fee are to be regarded as a true admission fee which the foreign corporation must pay to become a quasi-citizen of the State and entitled to equal privileges with citizens of the State, which include the right to do local business in the State, which is separate and distinct from interstate commerce, then any inequality therein, as between a foreign corporation and a domestic corporation in that respect, does not come within the inhibition of the equal protection clause of the Federal Constitution.

The line of demarkation separating foreign corporations that are without the equal protection clause from those that come within it was well stated in Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 510, 71 L. Ed. 372, 380, where Mr. Chief Justice Taft, delivering the opinion of the court, said:

"In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, *a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State and the tax burden* which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. *With respect to the admission fee*, so to speak, which the foreign corporation must pay to become a quasi-citizen of the State and entitled to equal privileges with citizens of the state, *the measure of the burden is in the discretion of the State* and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but *after its admission*, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind. In this class of cases, therefore, the question of the application of the equal protection clause turns *on the stage* at which the foreign corporation is put on a level with domestic corporations in engaging in business within the State. * * * While we may not question the meaning of the tax law as interpreted by the State court in the manner and effect in which it is to be enforced, we must reexamine the question passed upon by the State court as to [fol. 234] *whether the law complained of is a part of the condition upon which admission to do business of (in) the*

State is permitted and is merely a regulating license by the State to protect the State and its citizens in dealing with such corporation, *or whether it is a tax law for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State.*" (Italics and matter in parenthesis ours.)

But even though such initial entrance fee or such additional entrance fee should not be regarded as a true admission fee, they would not contravene such equal protection clause as between domestic and foreign corporations, because they are larger than the charter fee and the additional charter fee required to be paid by a domestic corporation when it receives its charter and subsequently amends such charter by increasing its maximum authorized capital stock.

As has been observed, corporations under the Virginia statutes are divided into two classes, domestic and foreign. Where domestic and foreign corporations are thus classified, foreign corporations may be discriminated against by imposing upon them a heavier license tax than is imposed on domestic corporations.

In Cooley on Taxation (4th Ed.), Sec. 359, it is said:

"Domestic and foreign corporations may be classified separately, and foreign corporations may be discriminated against by imposing heavier taxes on them than on domestic corporations. This is an exception to the general rule that a State may not discriminate against non-residents. *Foreign corporations are not 'citizens' within the Federal Constitution relating to equal privileges and immunities.* The reasons for this rule are (1) that such a classification is a reasonable one, and (2), so far as privilege taxes are concerned, a State may impose any such conditions as it desires as a condition to permitting foreign corporations to do business in the State, *provided* foreign or interstate commerce is not illegally interfered with. For the privilege of doing business in the State, a State may impose upon foreign corporations any conditions it desires, and *a license fee or tax* so imposed cannot be attacked because no such fee or a smaller fee is required of domestic corporations. This is the basis of most of the decisions upholding discriminatory taxes against foreign corporations as compared with taxes against domestic corporations. So far as

a tax is imposed on foreign corporations for the privilege of [fol. 235] doing business and exercising their corporate privileges in the State, the constitutional requirement of equality is not applicable. *Foreign corporations are not denied the equal protection of the law, as contrasted with domestic corporations by compelling both foreign and domestic corporations to pay a charter fee of a fixed per cent of the authorized capital stock, on the theory that the bulk of the capital of foreign corporations is invested in property outside the state.*" (Italics ours.)

In Garr S. & Co. v. Shannon, 52 Tex. Civ. App. 634, 115 S. W. 361, it was held that a franchise or license tax equal on all foreign corporations of the same class is not invalid on the ground that a lesser tax was imposed on domestic corporations. This decision was affirmed in 22[illegible] U. S. 468, 56 L. Ed. 510, without a discussion of the point now involved.

In Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127, the court stated the doctrine that "no limitation upon the power of a State to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

In Cheney Bros. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632, the Supreme Court of the United States, quoting from Kansas City, M. & B. R. Co. v. Stiles, supra, reiterates that "a State may impose a * * * rate of taxation upon a foreign corporation for the privilege of doing business within the State", which differs from the rate that it "applies to its own corporations upon the franchise which the State grants in creating them".

The question of the valuation to be placed on the non-par stock, if any, of either a domestic corporation or a foreign corporation is not involved in the question now under consideration, but it will be observed that, under the Virginia statutes here involved, non-par stock is, for the purpose of ascertaining the charter fee and additional charter fee and the annual franchise tax of domestic corporations and the initial entrance fee and additional entrance fee of a foreign corporation, to be taken to be of the value of $100.00 a share. There is no unconstitutional discrimination in the determination of an admission fee required to be paid by a foreign corporation seeking to secure a permit to do

business in the State at a flat rate for each share of stock without regard to the true value of the stock or the amount paid into the corporation upon its issue and there is no difference in this regard between par and non-par stock.

In New York v. Latrobe, 729 U. S. 421, 73 L. Ed. 776, the Supreme Court of the United States reversed In re Thermiodyne Radio Corporation, 26 Fed. (2d) 713, which [fol. 236] is cited by the petitioner, and held that the fact that disparity between the par value and actual value of corporate stock may be different in the case of different corporations does not render a franchise tax upon a foreign corporation based upon the par value of its stock unconstitutional as denying the equal protection of the law, and that there is no unconstitutional discrimination in the assessment of a franchise tax against a foreign corporation doing business within the State at a flat rate for each share of stock without regard to the true value of the stock or the amount paid into the corporation upon its issue.

A foreign corporation seeking to secure a certificate of authority in a State is not entitled to preferential treatment over domestic corporations in the computation of the fee based upon stock without par value.

In State v. Pierce Petroleum Co., 318 Mo. 1020, 2 S. W. (2d) 790, the court said:

"In addition to what has been said, the further thought suggests itself that the very act which authorizes a domestic corporation to issue shares of stock without nominal or par value provides that every such share shall be considered the equivalent of a share having a par value of $100, for the purpose of computing the annual franchise tax; in accepting the privilege granted, such a corporation voluntarily assumes the burden imposed. And of course the corporation of another State, desiring to do business in this State, is not entitled to preferential treatment in that respect."

It may be noted further that, as to the only annual charge imposed upon a foreign corporation, the nominal service fee known as the registration fee, foreign corporations are on an absolute parity in every respect with domestic corporations.

I am of the opinion that the statutes in question are not violative of the Federal Constitution, because they require

a foreign corporation larger initial fees for the privilege of doing intrastate business than they require from a domestic corporation as a condition of receiving its charter, and larger additional fees when the foreign corporation increases its authorized capital stock than they require from a domestic corporation when it increases its capital stock.

The remaining question for consideration in this connection is whether or not the statutes imposing the initial entrance fee and the additional entrance fee upon foreign corporations, as a condition of securing the right to do local business in Virginia and of the continuance of such right, [fol. 237] contravene the equal protection clause of the 14th Amendment to the Federal Constitution as between foreign corporations. Again it becomes necessary to draw a distinction between a true *admission* fee which a foreign corporation is required to pay in order to do local business in the State and to become a quasi-citizen of a State and entitled to equal privileges with citizens of the State and an *annual* franchise or license tax imposed upon a foreign corporation for the privilege of doing business in the State. After foreign corporations have been admitted to do business in the State, the *annual* license fees or franchise taxes imposed must be equal, or be based upon reasonable and not arbitrary classifications, and such fees or taxes must not, in their practical operation, constitute an unreasonable burden upon interstate commerce and/or reach property not subject to the taxing power of the State. Such an inequality must necessarily result where one factor is authorized capital stock and another factor is property owned in the State or property and/or business transacted in the State. To illustrate—a foreign corporation with an authorized capital stock of 50,000 shares of the par value of $100.00 a share which owns and uses in the State 50% of its entire property would pay a different tax from a foreign corporation with an authorized capital stock of 200,000 shares of the par value of $100.00 each. These figures serve only to illustrate that each corporation would pay according to the number of its authorized shares a different sum for exactly the same privilege, viz., that of entering the State and holding 50% of its entire property there. Clearly in such a case authorized capital stock when used as a measure for the annual license fee or franchise

tax discriminates between foreign corporations and violates the equal protection clause of the Federal Constitution, but such illustrations have no application to the questions here involved, as the entrance fees consisting of the initial entrance fee payable before the foreign corporation commences intrastate business and the additional entrance fee required to be paid when and if the corporation increases its maximum authorized capital stock, imposed by the statutes now under consideration, constitute the admission fee required to be paid by the foreign corporation as a condition of securing the certificate of authority to do local business in the State and of the continuance of the right to do such business. The foreign corporation has at the time of making application for a certificate of authority to do business in Virginia presumably done no local business or acquired any property in Virginia, as to have done so would have constituted a violation of the law. No illegal [fol. 238] discrimination can possibly result from the Virginia statutes here involved as between two corporations seeking to procure a certificate of authority to do business in Virginia, or, after having procured such certificate of authority, amending their charters so as to increase the amount of their authorized capital stock. The fees paid by corporations all of whose stock is with par value or without par value or partly with and partly without par value is measured in the same way. Where shares of stock have a par value, the par value in the *measurement*, and where the shares of stock have no par value, the shares of stock without par value are to be taken to be of the value of $100.00 each. There is no conceivable ground for the contention that the statutes in question discriminate between foreign corporations, unless it is based upon the arbitrary valuation of shares of stock without par value at $100.00 a share. This contention would have, as above stated, some force if there was here involved the question of a tax upon a foreign corporation already admitted to do business in Virginia, and such tax was computed according to the proportion of its authorized capital stock, represented by its business done and/or property used in Virginia, but no question of business done and/or property owned or used in Virginia is involved in the measurement of this entrance fee, which is not a tax, and the fact that it is not a tax distinguishes it from all the cases cited by the peti-

tioner in which any question of inequality between foreign corporations was involved. The petitioner quotes from the case of Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. Ed. 174, language to the effect that the mere number of shares of authorized non-par value stock is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of *annual fees* to be imposed upon them for the privilege of doing business in the State and that such a charge violates the equal protection clause of the Federal Constitution. The nature of the statute imposing such annual fee and the facts involved in such case have been heretofore stated in the consideration of whether the entrance fees imposed by the Virginia statutes contravene the commerce and/or the due-process-of-law clauses of the Federal Constitution. Mr. Justice Butler said:

"The *number* of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital, * * * The *number* of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be [fol. 239] subscribed or issued, or additional shares may be issued to acquire property or do business in other states, or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock, or to its value, or to the amount of plaintiff's capital, its property, or its business, intrastate in Ohio or interstate. The act, in its practical operation, does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the States where organized, they chance to be authorized to issue the same *number* of non-par value shares, the *annual franchise fees* imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio, will not be the same; and the charge imposed on one may be many times that made against another. If plaintiff's authorized shares were of the par value of $100 each, the amount of capital stock for apportionment between its property and business in Ohio and its interstate business to arrive at the franchise fee would be $40,000,000; and, adopting the basis

of apportionment determined by the lower court, which attributed about 75 per cent of the shares to the property and business in Ohio, the amount of the fee would be $44,778; and with par value of $7 each,—the amount for which the Commissioner of Securities authorized plaintiff to sell its shares in Ohio, and their admitted value,—the amount for such apportionment would be $2,800,000, and the fee would be $3,134.46. These figures are to be contrasted with $14,926, fixed by the lower court. Again, compare two corporations organized in a sister state, having the same number of authorized non-par value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that State, and also much property and business in other States. The act would require the former to pay 5 cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of its shares representing its property owned and used and business transacted in Ohio. It is clear that the *mere number* of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations *for the purpose of determining the amount of such annual fees.* Such a classification is not based on anything having relation to the purpose for which it is made. * * * The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result [fol. 240] from its application. * * * The act violates the equal protection clause of the 14th Amendment." (Italics ours.)

The facts involved in the Air-Way Electric Appliance Case and the statutes there involved differ materially from the Virginia statutes now under consideration, and such case cannot be regarded as authority for holding them unconstitutional. No question relating to the initial entrance fee was involved, but the only question involved was the question of the validity of an annual franchise tax, one factor in the computation of which was the proportion of the company's business done and property owned within the State and the other factor was the amount of its authorized capital stock, only a part of which had been actually issued, and it was held that as *after admission* into the State foreign corporations stand equally, the State could not impose a tax on a classification of foreign corporations having no

reasonable basis. Analyzing the opinion in the case cited, the business done and the *non-par character* of the stock was of *little consequence*. The controlling factor was the use of authorized capital stock to determine the amount of the annual franchise tax. Whether the stock is of non-par value or of a fixed par value, the principle announced in the Air-Way Electric Appliance case applies; namely, that a statute *imposing a yearly license tax* upon a foreign corporation *already admitted* to do business in the State for the privilege of doing local business and/or of holding or using property in the State contravenes the equal protection clause of the Federal Constitution, as between foreign corporations *admitted* to do business and holding property in the State, if and when said license tax is computed according to the proportion of the authorized capital stock which is represented by its property owned and used and/or business done in the State.

The Air-Way Electric Appliance Case was followed by the Supreme Court of Illinois in O'Gara Coal Co. v. Emmerson, 326 Ill. 18, 156 N. E. 814, which has been heretofore considered, and from which the petitioner quotes at length, where there was involved an *annual franchise tax* computed in accordance with the proportion of the authorized capital stock which was represented by business transacted and property owned in the State. It has also been followed in Great Northern Ry. Co. v. State, 147 Washington 630, 267 Pac. 506; State v. Dammann (Wisc.) 224 N. W. 139, and State v. Azel Meadows Realty Co., 108 W. Va. 118, 150 S. E. 378, where *an annual franchise tax* similarly computed was held valid and in Chicago, M. & St. P. R. R. Co. v. Harman, (Mont.) 295 Pac. 762. No question of [fol. 241] arbitrary valuation of non-par stock arose in any of the cases cited, save in O'Gara Coal Co. v. Emmerson, supra. In the O'Gara Coal Company Case the court, in summarizing its conclusions, said:

"(2) The number of shares into which the capital stock of foreign corporations may be divided is not a reasonable basis for classification of such corporations for the purpose of determining the amount either of the initial fee for a certificate of authority to do business in Illinois or of the annual franchise tax, and therefore an arbitrary valuation of the capital stock of no par value of such corporations at $100 a share, or any other definite amount a share, without

reference to par value, sale price, market price, or any consideration other than number of shares, renders such classification discriminatory against corporations which have issued such stock at prices less than $100 a share and denies to them due process of law and the equal protection of the laws. * * *"

This conclusion was based upon the Air-Way Electric Appliance Case, where no question of an entrance fee required to be paid for authority to do local business in the State, but only an annual franchise tax, was involved, and the only question was whether or not the mere number of authorized non-par value shares was a reasonable basis for the purpose of determining the amount of such annual franchise tax. The Supreme Court of Illinois refused to follow American Uniform Company v. Commonwealth, 237 Mass. 42, 129 N. E. 622, and Detroit Mortgage Corp. v. Secretary of State, 211 Mich. 320, 178 N. W. 697, 182 N. W. 586, but followed People v. Mensching, 187 N. Y. 8, 79 N. E. 884, and People v. Walsh, 191 N. Y. S. 184. In American Uniform Co. v. Commonwealth, supra, there was involved the validiy of a statute levying an annual excise tax on a foreign corporation for the privilege of doing business in the State and providing that for the purpose of assessing the excise upon corporations whose stock was issued without a par value, $100.00 should be considered par, and that the amount of such excise tax in any one year could not exceed $2,000.00. Such statute was held not to violate any provision of the Massachusetts Constitution by working a disparity between corporations with stock of par value and those having stock of no par value, nor to deny a foreign corporation having stock of no par value the equal protection of the law guaranteed by the 14th Amendment or to be invalid as a regulation of interstate commerce. Rugg, C. J., delivering the opinion of the court, said:

[fol. 242] "Under the Federal and State Constitutions the transaction of local business within this commonwealth by foreign corporations is a privilege which may be granted or denied by the commonwealth. If the sovereignty confers the gift, it may fix its own terms, provided they are not contrary to the Constitution. *A fixed excise of* $2,000 *doubtless might be charged each foreign corporation for the privilege of doing here a local business without violat-*

ing any right guaranteed by the Constitution of the United States. That is the maximum amount of the excise under any circumstances, no matter how large may be the capital. The excise simply is measured by the par value of the shares up to that fixed maximum. Before the enactment of St. 1918, c. 235, as well as since, the actual value or the market value of the shares has been of no consequence whatever. Two foreign corporations, each of the same amount of capital stock at par, one on the verge of bankruptcy and its stock valueless both in truth and on the market, and the other highly prosperous and its stock both in truth and on the market worth double its par value, would pay the same excise under the law. The reason for this is that the tax is an excise and not a property tax. It stands on the same footing in this respect in principle as most license taxes. Before the enactment of St. 1918, c. 235, the foreign corporation excise law made no express provision touching those corporations which had issued capital stock without par value. Doubtless it became necessary to make some provisions for the excise to be exacted of this class of foreign corporations. It was a practical legislative question how to deal with a somewhat perplexing problem. It would have been unfair to other corporations the actual value of whose stock is less than par, to establish the actual value of the stock of this class of corporations as the measure of the excise. Moreover, to pursue that course would have similitude to a property tax rather than an excise. It would be open to attack on the constitutional ground that it was an attempt to tax property outside the State, a ground held fatal in International Paper Co. v. United States, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624. * * * It is common knowledge that the par value of the shares of very many business corporations is $100 each. It well may be that the general court had definite knowledge as to facts in this particular. At any rate it was its duty to adopt some measure for the excise to be charged against such corporations, reasonably fair to them as compared with the excise levied on other foreign corporations. Excises upon corporations have been measured in a great variety of ways. * * * Corporations with capital stock of a par value afford an easy measure

[fol. 243] for the computation of the excise. There is no such ready at hand measure for the computation of the excise upon corporations, having capital stock without par value. Some excise must be exacted from them in fairness to other foreign corporations. The latter would have just ground for complaint if they were exempted altogether. It cannot be deemed oppressive to enact a general rule as to all such corporations that the excise shall be measured by the par value which most frequently prevails in corporations whose stock has a par value. The maximum which can be levied in any event is reasonable and is the same for all corporations. Such a rule is founded as nearly as may be upon common experience. It works no disparity between corporations with and those without stock of a par value, but is an approximation to equality between the two. There is nothing in St. 1918, c. 235, violative of any provision of the Constitution of this Commonwealth. We are of the opinion that there is nothing in the statute here assailed in conflict with the Fourteenth Amendment to the Constitution of the United States. * * * The present statute is not a property tax and is not regulative of interstate commerce. Baltic Mining Co. v. Commonwealth of Massachusetts, 231 U. S. 68, 58 L. Ed. 127. It is not discriminatory or unequal in the sense of denying to the petitioner the equal protection of laws. *Absolutely equality is impossible even in the operation of laws for the taxation of property.* It is even *more difficult* to arrive at exact uniformity *in the operation of excise laws.* That is not required by the Constitution. It is enough if they are not unreasonable in the light of all the conditions to which they are likely to apply. *The present statute applies evenly to all foreign corporations seeking to avail themselves of the privilege of doing a domestic business within the borders of Massachusetts and having capital stock without par value. Its design* is to put the corporations having capital stock *without par value* as nearly as may be *on the same* footing touching excises as those having a capital stock *with a par value.* The petitioner is not singled out as a special object for hostile or discriminating legislation. It is not easy to perceive any more equitable way of dealing with a somewhat puzzling and difficult question than that adopted by the Legislature. In any event we think it cannot be said that this statute is unequal in its

operation, or that it deprives the plaintiff of its property without due process of law." (Italics ours.)

Although the issues were not the same, some of the language in Detroit Mortgage Co. v. Secretary of State, 211 Mich. 320, 187 N. W. 697, 182 N. W. 587, also supports [fol. 244] the same view. The cases of People v. Mensching, 187 N. Y. 8, 79 N. E. 884, and People v. Walsh, 195 N. Y. Supp. 184, which were cited by the Supreme Court of Illinois in the O'Gara Coal Co. Case as holding a contarary view to that expressed in American Uniform Co. v. Massachusetts, supra, and which were followed by such court did not involve the question under consideration by it. In People v. Walsh, supra, there was held unconstitutional a New York statute valuing no par value stock at $100.00 per share *for purposes of taxation,* but the New York tax was based upon capital issued and the value of such capital is determinable, whether represented by par value stock or no par value stock. No charge based on authorized capital stock was involved in such case. People v. Mensching, supra, involved a stock transfer tax and, as construed by the court, each share of stock was taxed at a fixed sum, regardless of its face values may not be taxed at the same amount and it dealt with stocks whose values could readily be determined to be different. That the rule laid down in the O'Gara Coal Co. Case to the effect that for the purpose of determining either the amount of the initial fee for a certificate of authority to do business in Illinois or of the annual franchise tax, an arbitrary valuation of no par stock at $100.00 a share without reference to par value, renders such classification discriminatory against corporations which have issued such stock at prices less than $100.00 a share and denies them the equal protection of the laws, is unsound, seems to be conclusively shown by the decision of the Supreme Court of the United States in Peoples v. Latrobe, 279 U. S. 421, 73 L. Ed. 776 (which reversed In re Thermiodyne Radio Corporation, 26 Fed. (2d) 713, cited by the petitioner in its brief), where it was held that the fact that the disparity between the par value and the actual value of corporate stock does not render a franchise tax upon a foreign corporation based upon the par value of its stock unconstitutional as denying the equal protection of the laws; that a statute imposing upon foreign

corporations, as a prerequisite of continuing to do business within the State, a tax or license fee computed upon the basis of the capital stock employed by it within the State during the first year it does business there, does not infringe the equal protection of the Fourteenth Amendment in fixing the amount of such tax in the case of stock of non-par value at a flat rate per share, while in case of stock having par value, the stock is fixed at a fraction of the par value; that there is no unconstitutional discrimination in the assessment of a franchise tax against a foreign corporation doing business within the State at a flat rate for [fol. 245] each share of stock without regard to the true value of the stock or the amount paid into the corporation upon its issue. Mr. Justice Stone, delivering the opinion of the court, said:

"The bankrupt is a Delaware corporation whose authorized capital stock consists of 250,000 shares without par value, all of which has been issued at an average price of $2.32 per share. It commenced doing business in New York in November, 1924, and its total assets were used in its business in that State during the following year. The value of its tangible assets is alleged to have been but $280.00, or about $1.12 per share, and its intangible property to have been of no value. A tax of $15,000, computed at 6 cents per share, was assessed against it, and is the basis of the present claim.

"The rejection of the claim by the referee was upheld by the district court on the sole ground that the tax on the bankrupt's non-par stock at the fixed rate of 6 cents per share, without regard to its true value or the amount paid into the corporation upon its issue, *infringed the equal protection clause of the 14th Amendment.* The court (28 Fed. (2d) 1017, aff'g In re Thermiodyne Radio Corp., 26 Fed. (2d) 713) thought that, as the tax could not be regarded as a true admission fee imposed as a condition of entrance into the State, the corporation was thus in a position to invoke the equal protection clause (see Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr), 272 U. S. 494, 510, 71 L. Ed. 372, 380), the invalidity of the taxing statute was established by the decision of this court in Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 83, 69 L. Ed. 169, 177, * * *, since foreign corporations having the same amount of business and property

both within and without the State, but with a different number of issued non-par shares, might be required to pay a tax differing from each other and from other foreign corporations with par value stock having like property within and without the State. The court of appeals of New York has since reached the opposite conclusion, both as to the nature of the tax and its constitutionality. People ex rel. D. W. Griffith v. Loughman, (249 N. Y. 369, 164 N. E. 253). For present purposes *we need not determine whether the tax may be sustained because imposed as a condition of entrance into the State,* for, assuming that the bankrupt corporation was within the State, and thus entitled to equal protection (Hanover F. Ins. Co. v. Harding, supra; Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. Ed. 536, 541), * * * we do not deem the decision in the Air-Way Electric Appliance Corp. case controlling, nor the tax so unreasonable or discriminatory as to deprive the bankrupt [fol. 246] of any constitutional immunity. * * * It is said that the tax computed on the number of non-par shares at a flat rate may bear little relation to the property and business of the corporation within the State, and consequently corporations having like property and business within the State, but with a different non-par capitalization, may be required to pay a different tax. But this is equally true of corporations having par value stock, even though full value be paid in on its issue. Par value and actual value of issued stock are not synonymous, and there is often a wide disparity between them. Par value has long been a familiar basis of computing a franchise tax upon foreign corporations, and when otherwise unobjectionable has been repeatedly upheld by this court. * * * We have likewise sustained *a state franchise tax on foreign corporations, measured by a fixed percentage of its non-par stock value, as required by the statute, at* $25 *per share,* and apportioned to the property and business in the corporation within the State. Margay Oil Corp. v. Applegate, 273 U. S. 666, 71 L. Ed. 830, * * * affirming 167 Ark. 614, 269 S. W. 63; Gilliland Oil Co. v. Arkansas, 274 U. S. 717, 71 L. Ed. 182, * * * affirming 171 Ark. 415, 285 S. W. 16.

"The kind and number of shares with which a foreign corporation is permitted to carry on its business within the State is a part of the privilege which the State extends

to it and is a proper element to be taken into account in fixing a tax on the privilege. It may be assumed that, if the doing of business with a great number of non-par shares is not deemed by the taxpayer to be a value privilege, it will reduce the number of shares as the statute permits. *A State which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock* (Roberts & S. Co. v. Emmerson, supra), *has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there,* and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the State *and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.* * * * We think that the measurement of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the State, is likewise reasonably related to the privilege granted by the State and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional im- [fol. 247] munity. *Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having non-par stock from that applied to corporations having stock of par value.* In Roberts & S. Co. v. Emmerson, supra, at p. 56, it was pointed out that *there were such differences between par and non-par shares,* both in their legal incidents and their actual use, and such practical difficulties in measuring a tax by the latter except by assigning to them an artificial or fixed value or assessing them at a flat rate, *as to justify the classification for purposes of a franchise tax on domestic corporations.* It was accordingly held that *such a tax may be based on the par value of shares of corporations having par value stock, and on a fixed value assigned to non-par shares, regardless of the actual value or the varying amounts paid in upon them.* But *these differences between the two classes of stock,* and especially the difference in the rights of creditors of the two classes of corporations, *equally justify classification and discrimi-*

nation between them in fixing a franchise tax based on corporate stock of foreign corporations. The inequalities in the tax result from a classification founded upon real differences, hence the resulting discrimination is not arbitrary or prohibited by the 14th Amendment." (Italics ours.)

In the O'Gara Coal Co. case it was held that the rule declared in Roberts & Schaefer v. Emmerson, 271 U. S. 50, 70 L. Ed. 827, as to the validity of the classification of corporations having stock with par value and stock without par value should be restricted to domestic corporations *and not extended to foreign corporations,* but a contrary view was taken by Mr. Justice Stone. It may be observed that in New York v. Latrobe, supra, Mr. Justice Stone indicated that it might be proper to draw a distinction between admission fee imposed as a condition of entrance into the State and a tax imposed upon a corporation after it had entered the State, saying: "For the present purpose we need not determine whether the tax should be sustained because it is imposed as a condition of entrance into the State." He decided the case on the assumption that the foreign corporation in question was within the State and thus entitled to equal protection.

In International Shoe Co. v. Shartel, 279 U. S. 429, 73 L. Ed. 781, it was held that a statute providing for the computation of an annual franchise tax upon corporations having non-par stock by assigning to such stock a specific [fol. 248] value, irrespective of its actual worth, and applying to it the rate applicable to par value stock, does not deny the equal protection of the laws. The appellant in its brief (73 L. Ed. 783) cited the O'Gara Coal Co. v. Emmerson case, and In re Thermiodyne Radio Corporation, 26 Fed. (2d) 713, but the court followed New York v. Latrobe, supra, Mr. Justice Stone, delivering the opinion of the court, saying:

"For reasons, stated more at length in our opinion in that case, we concluded that the present statutes does not infringe that clause of the 14th Amendment. Although it directs that the tax be ascertained by assigning a specific value to the non-par stock, and applying it to the rate applicable to par value stock, the resultant inequalities do not differ from those complained of in that case where the tax was computed at a flat rate on non-par stock, used in

the State, without assigning to it any value. *The assignment to the shares of a value in excess of their present worth or of the present value of the assets within the States does not operate to tax property or business without the State.* The tax is a privilege and not a property tax. *Giving to the shares a specified value by which the tax is measured,* only *affects the rate of tax on the privilege and does not give the statute an extraterritorial effect.* The result is the same as if a flat tax of 5 cents per share upon that part of the capital which is justly apportioned to the State had been imposed. So apportioned, the tax cannot be said to reach the property or the franchise of the corporation without the State."

In International Shoe Co. v. Shartel, supra, the court cited State v. Pierce Petroleum Corp., 318 Mo. 1020, 2 S. W. (2d), where there were involved statutes providing for an annual franchise tax and declaring that for the purpose of determining the franchise tax on foreign corporations having shares of stock without par value, such shares should be considered equivalent to shares having a par value of $100.00 each. The court, in a well considered opinion, sustained the validity of the statute and held that a statute which for the purpose of computing the franchise tax divides stock corporations into two classes: (a) those having a capital stock of a stated par value, and (b) those whose shares are without nominal or par value, and provides with respect to one that the tax shall be computed on the par value of the capital stock and surplus and with respect to the other that the tax shall be computed on an arbitrary valuation of $100.00 a share and surplus, treating exactly alike every corporation falling within the same [fol. 249] class, whichever it may be, makes a reasonable and natural classification of corporations, in view of the object to be attained; that such classification is founded upon a real difference and so much of it as requires no par value stock to be assessed at $100.00 a share, violates no constitutional requirement of uniformity or inhibition of inequality; and that where a statute which authorizes a domestic corporation to issue shares of stock of no nominal or par value, provides that every such share shall be considered the equivalent of a share having a par value of $100.00 for the purpose of computing the annual franchise tax, a domestic corporation in accepting the privilege thus

granted, voluntarily assumes the burden imposed, and of course a foreign corporation desiring to do business in the State is not entitled to preferential treatment in that respect.

In State v. Margay Oil Corp., 167 Ark. 614, 621, 269 S. W. 63, 65, affirmed in Margay Oil Corp. v. Applegate, 273 U. S. 666, 71 L. Ed. 830, on the authority of Roberts & S. Co. v. Emmerson, 271 U. S. 50, 70 L. Ed. 827, the Supreme Court of Arkansas stated it to be an established principle that a State may without violating constitutional rights make a reasonable classification for the purposes of taxation and held constitutional and valid as against a foreign corporation having no par stock a State franchise tax, applying to both domestic and foreign corporations and providing that in case of corporations issuing stock without par value "for the purpose of the taxes or fees prescribed by law to be paid on the filing of any certificate or other paper relating to corporations and of franchise taxes prescribed by law to be paid by corporations to the State of Arkansas, but for no other purpose, such shares shall be taken to be of the par value of $25.00 each." The court said:

"The power of the State to make reasonable classifications for purposes of regulation or of taxation has been often decided and never denied, and such classifications will not be overturned by the court if all corporations of the same class are treated alike. * * * The statute under consideration applies equally to all corporations organized on the same basis, both domestic and foreign, that is to say, corporations with non-par value stock. It may be true, as urged by counsel for appellees, and as shown by illustrations in the brief, that the statute may work a difference in the amount of tax as between corporations having the same amount of assets, but this argument is answered by the fact that a corporation may choose for itself whether it shall or shall not bring itself within the terms of this [fol. 250] statute. It is a voluntary act of the corporation in accepting the statutory basis of par value, rather than to express a value in the face of the certificate. Such statutes are not uncommon, but, on the contrary, are in vogue in a great many of the States, such statutes generally prescribing a par value of $100.00."

No ground for the contention, that the Virginia statutes providing for the initial entrance fee and additional en-

trance fee deny to foreign corporations the equal protection of the law, can be predicated upon the fact that for the purpose of determining such fees they assign to non-par value stock an arbitrary value of $100.00 per share. Such statutes do not deny to foreign corporations seeking to procure, or extend a certificate of authority to do local business and/or exercise their corporate functions in Virginia, the equal protection of the law.

The petitioner, however, is not in a position to complain that the additional entrance fee is measured by authorized instead of issued capital stock. One not hurt by a statute cannot challenge its constitutionality. Simultaneously with the amendment of the charter providing for the increase of the maximum authorized capital stock, all the stock of the complainant was issued. This clearly appears from paragraph 6 of the stipulation, which reads:

"That on July 1, 1921, the proper authority of the State of Illinois authorized the amendment of the charter providing for the conversion of the $100,000.00 par value common stock into $100,000.00 par value preferred stock with certain preferences and rights and created additional stock consisting of 10,000 shares of no par value common stock, and provided that the same might be sold for not less than $5.00 per share in cash or property, as might be determined by the board of directors, and further provided for the issuance of the 10,000 shares of no par value common stock for $50,000 to be transferred from surplus account to capital account in full payment of the 10,000 shares of no par value common stock which were *simultaneously* issued to the holders of the new preferred stock in proportion to their holdings thereof."

So that since July 1, 1921, and at all times thereafter, all of the authorized capital stock had been issued.

In Roberts & Shaefer Co. v. Emmerson, 271 U. S. 50, 55, 70 L. Ed. 827, 833, it was held that a corporation, *all of the* [fol. 251] *authorized capital stock* of which *is issued,* cannot raise the question of the validity of a statute which measures franchise taxes by authorized instead of issued capital stock. Mr. Justice Stone, delivering the opinion of the court, said:

"We cannot say that a State may not impose a franchise tax on a domestic corporation, measured by its authorized

capital stock. * * * But the plaintiff is not in a position to raise the question. As this court has often held, one who challenges the validity of State taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect it, but must show that he is himself affected unfavorably by the discrimination of which he complains. * * * The plaintiff cannot complain that the tax is measured by authorized instead of issued, capital stock, because all of its authorized capital stock has been issued."

(4) *As to the contention that the registration fee imposed by section* 210 *of the Tax Code is invalid.*

The nature of such registration fee has been heretofore considered.

In Lever Brothers Co. v. Commonwealth, 232 Mass. 22, 121 N. E. 516, there was involved the validity of a registration fee exacted from foreign corporations *for filing annual certificates of conditions,* and which was not intended to apply to foreign corporations not engaged in domestic business within the Commonwealth, and which was, therefore, similar to section 210 of the Tax Code requiring domestic corporations and every foreign corporation doing or authorized to do business in the State to pay the registration fee above referred to, and also to file an annual report in the month of January in each year, and it was held that such registration fee was rational in design and reasonable in amount. Rugg, C. J., said:

"The petitioner also seeks to recover a fee of $5 paid by it under section 91 of St. 1913, c. 437, for filing its annual certificate of conditions required by St. 1909, c. 490, part 3, Sec. 54. *This is not a tax, but a simple fee no larger in amount than may be regarded as necessary to bear the expenses of maintaining and caring for records.* It is a fixed sum exacted of all foreign and domestic corporations like which come within its scope. * * * Whether it is valid under the police power of the Commonwealth need not now [fol. 252] be decided. See in this connection, New York v. Miln, 11 Pet. 102, 139, 9 L. Ed. 648; Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 61 L. Ed. 1086; Cooley's Constitutional Limitations (7th Ed.), 857, 858. However that may be, it was held in Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467, that section 66 of St.

1903, c. 437 (now said section 54), would be invalid if applicable to corporations engaged exclusively in interstate commerce and not conducting a local business, and that hence it was not intended by the general court to apply to such foreign corporations as were engaged exclusively in interstate commerce. It follows as a necessary corollary of that decision that said section 91 was not intended by the legislature to apply to foreign corporations not engaged at all in domestic business within the Commonwealth. * * * But the petitioner is a foreign corporation engaged in intrastate commerce within this Commonwealth. *It is not engaged exclusively in interstate commerce.* It can only engage in that local business on such terms as the Commonwealth imposes, having regard to constitutional immunities. *It seems to us not open to serious discussion that the requirement of a registration fee of so trifling a sum as* $5 *is rational in its design and reasonable in amount.* This was decided in substance in Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467."

The only difference between the registration fee involved in the case last cited and that involved in the case at bar was that in the case cited there was a flat fee of $5.00; while in the case at bar the fee is graduated in proportion to the amount of capital stock, and ranges from $5.00 to $25.00, but cannot exceed the latter amount.

Section 210 of the Tax Code provides for a fee which is *separate and distinct* from the entrance fee and the additional entrance fee, which are prescribed by sections 207 and 208 of the Tax Code and section 5 of chapter 48 of the Acts of 1919 and the invalidity of the one would not in any wise affect the validity of the other. The entrance fee and the additional entrance fee were provided for by the Tax Bill of 1902-3-4, while the annual registration fee was not made a part of the Tax Bill until 1906 (Laws 1906, page 516). Even if the registration fee were invalid, though it seems clear that it is not, it would not affect the validity of the entrance fee consisting of the initial entrance fee and the additional entrance fee. It is a general rule that where one part of a statute is unconstitutional but is in its nature separable from other parts, so that they may stand independently, and there is no such connection between the valid

[fol. 253] and invalid parts that the Legislature would not be expected to enact the valid part alone, that part will be held good.

In Lawton Spinning Co. v. Commonwealth, 232 Mass. 28, 121 N. E. 518, Rugg. C. J., said:

"It is a principle firmly imbedded in the jurisprudence of this commonwealth that in the consideration of a statute where one part is unconstitutional, which is in its nature separable from other parts so that they well may stand independently of it, and there is no such connection between the valid and the invalid parts that the general court would not be expected to enact the valid part without the other, the parts of the statute not in conflict with the Constitution will be held good. That was early decided by this court and was amplified by Chief Justice Shaw in Warren v. Mayor and Aldermen of Charlestown, 2 Gray. 84, 98, 99. That case often has been cited with approval by the Supreme Court of the United States. That principle has been steadily adhered to by this court. * * * To the same point is International Text-Book Co. v. Pigg, 217 U. S. 91, 113, 54 L. Ed. 678. That principle is applicable to the two statutes here in question. St. 1914, c. 724, is a distinct act, entirely separable in its form, in its terms, in its practical operation and in the date of passage from said section 56. The latter was in face enacted first as a distinct statute. Upon it was ingrafted chapter 724 at a later time by a different Legislature. It can be declared unconstitutional without in any way affecting the validity of said section 56. It is not necessary to resort to speculation to determine whether the Legislature would have enacted one statute without the other because it did in fact enact section 56 as a separate provision and suffered it to remain at least six years without change before it undertook to enact the supplemental provision of said chapter 724."

* * * * * * *

The conclusions which we have reached may be summarized as follows:

* * * * * * *

(4) The exaction from a foreign corporation engaged in local business, separate and distinct from interstate com-

[fol. 254] merce, of the initial entrance fee imposed by section 207 of the Tax Code of Virginia (Acts 1928, p. 35), as a condition of issuing to it a certificate of authority to do local business in the State and/or the exaction from such a corporation, after it has received such certificate of authority, of the additional entrance fee imposed by section 208 of such Tax Code for the filing of an amendment to its charter increasing its maximum authorized capital stock, do not unlawfully burden interstate commerce or deny to it due process of law, the fees prescribed by the statute not varying direct proportion to capital stock and there being a fixed maximum, and not being an annual charge, nor in any possible sense a tax on or with relation to property or business of any kind or anywhere located or transacted;

(5) A distinction is to be made between and admission fee imposed upon a foreign corporation as a condition of entering the State to do local business and of becoming a quasi-citizen of the State and entitled to equal rights to a certain extent with citizens of the State and an annual franchise tax or excise tax imposed upon a foreign corporation after it has entered the State. The initial fee and the additional entrance fee imposed by section 3847 of the Code of Virginia and sections 207 and 208 of the Tax Code (Acts 1928, p. 35), constitute a true admission fee and not a tax;

(6) A foreign corporation cannot avoid or circumvent a statute imposing conditions upon its right to enter the State for the purpose of doing local business therein by engaging in interstate business, along with local, or intrastate, business;

(7) The mere fact that a foreign corporation is chartered for the purpose of engaging in interstate commerce or has authority under its charter to engage in interstate commerce does not prevent a State from imposing conditions upon its right to enter the State for the purpose of doing local business in the State, separate and distinct from interstate commerce, and the Virginia statutes do not, as they cannot under the United States Constitution, impose any condition upon the doing of interstate business alone;

* * * * * * *

(12) Sections 207 and 208 of the Tax Code of Virginia (Acts 1928, p. 35), when construed with section 5 of chapter

48 of the Acts of 1919, as amended by Acts 1926, p. 800 (Michie's Virginia Code of 1930, section 3780-e) do not deprive a foreign corporation of property without due process [fol. 255] of law in violation of sections 1 and 11 of Article I of the Constitution of Virginia;

(13) The registration fee imposed by section 210 of the Tax Code of Virginia (Acts 1928, p. 35) and section 4 and 5 of chapter 48 of the Acts of 1919 as amended by Acts 1926, p. 800, is not a tax, but is a fee exacted from domestic and foreign corporations alike, and is not intended to apply to foreign corporations not engaged in local business within the State. It is strictly and clearly a service fee, payable annually by all corporations, domestic or foreign, chartered or licensed by the State of Virginia on January 1st of each year. It is no longer in amount than may be regarded as necessary to bear the expenses of sending out the annual reports required of such corporations, examining the same when returned and maintaining and caring for the records of corporations doing business in the State and has a fixed maximum; it is rational in design and reasonable in amount and not open to any constitutional objection;

* * * * * * *

An order will be entered accordingly dismissing the petition, with provision for the payment of the costs of this proceeding by the petitioner.

Chairman's certificate to foregoing transcript omitted in printing.

[fol. 256] CLERK'S CERTIFICATE

I, N. W. Atkinson, Clerk, State Corporation Commission, do hereby certify that proper notice was given of the intention to apply for a transcript of the record in this case as the basis for appeal to the Supreme Court of Appeals of Virginia, pursuant to the provisions of Section 6339, Code of Virginia, 1919.

N. W. Atkinson, Clerk State Corporation Commission.

A Copy—Teste: M. B. Watts, C. C.

[fol. 257] IN SUPREME COURT OF APPEALS OF VIRGINIA

ATLANTIC REFINING COMPANY, a Corporation, Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee

JUDGMENT—January 16, 1936

Upon an Appeal from an Order Entered by the State Corporation Commission on the 14th day of November, 1934

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged and ordered that the same be and is hereby affirmed, and that the appellant pay to the appellee thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

[fol. 258] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the Justices

THE ATLANTIC REFINING COMPANY

v.

COMMONWEALTH OF VIRGINIA

From the State Corporation Commission of Virginia

OPINION BY JUSTICE HENRY W. HOLT—January 16, 1936

The petitioner, a non-resident commercial corporation, has been assessed with an entrance fee as a condition precedent to the privilege of doing domestic business in Virginia. This entrance fee it paid under protest and claims that the statute imposing it is unconstitutional. In proper proceedings relief was sought before the State Corporation Commission and refused. Hence, this appeal.

In the opinion of the Corporation Commission is a full and satisfactory statement of facts, which we might with confidence adopt as written, but for brevity we shall restate those matters which in our judgment are of major importance and upon which this case turns.

Necessarily, we look to conditions as they were when this fee was paid. If it was then a proper charge it is not invalidated by subsequent proceedings, nor can such proceedings make good that which was once void.

Indeed if this entrance fee had not been paid at the time of entry it might never be paid. Insolvency might intervene. The petitioner might complete its work and with-
[fol. 259] draw before an assessment or levy could be made.

The Atlantic Refining Company is a Pennsylvania corporation and was chartered there in 1870. It refines petroleum and sells its products in forty-seven states, and in fourteen of them, Virginia now included, it maintains local stations for the sale of its own products and of automobile accessories.

On January 7, 1930, petitioner gave notice to the Commission of its intention to do a general business in Virginia without first paying any entrance fee, suggesting, however, that it be permitted to pay this fee under protest. On January 13, 1930, the Commission replied that the company was at liberty to adopt its own procedure, but that domestic business done in Virginia without payment of an entrance fee would be at its peril. Payment was made under protest on January 17, 1930, and on January 22, 1930, the desired permit issued.

This litigation was properly begun on April 26, 1930, by petition addressed to the State Corporation Commission. It concludes with this prayer:

"Wherefore, your petitioner prays that this Honorable Body may certify to the Comptroller of the State of Virginia that petitioner has paid into the State treasury an amount in excess of that required by law, to-wit: $5000 on account of the entrance fee paid by the petitioner upon the granting of the certificate of authority to do business in the State of Virginia, and that the amount so paid may be refunded to petitioner, and that it may have all such other relief as to which it may be entitled."

[fol. 260] Relief was refused.

Previous to the permit of January 22, 1930, this oil company had directly and indirectly for six years or more done an interstate business in Virginia. This the State did not undertake to hamper. It was not seeking permission to do something which it was already doing but permission to do something in addition, namely, to do directly and in its own name an intra-state business.

Mr. Serven, Assistant Comptroller in charge of domestic marketing, was asked and replied:

"Q. In other words, the primary purpose in handling gas and oil products in Virginia is to supply what we might call the local Virginia business?

"A. That is correct."

Before January 22, 1930, this Pennsylvania corporation had done directly an interstate business in its own name. It had done through the Red "C" Oil Company, a subsidiary Maryland corporation, which included the business of the Richmond Oil Company, an inter-state and intra-state business, and it had done through the Atlantic Refining Company, a New York corporation, an intra-state business. Its volume in 1929 was:

"(1) Interstate business done by petitioner in its own name	$363,534
"(2) Business done by Red "C" Oil Company, both interstate and intra-state, but principally intra-state	$866,600
"(3) Business of Atlantic Refining Company, Inc., exclusively intra-state	$166,466
"Total	$1,396,600"

[fol. 261] This is its statement of its business on January 1, 1930:

"The only business in which petitioner was interested in the State of Virginia was the business, interstate and intra-state, of the Red "C" Oil Company and the interstate business conducted by petitioner in its own name; and the only property in Virginia in which petitioner was interested was the above described property belonging to Red "C" Oil Company having a value of approximately $262,580."

As of January 22, 1930, the total authorized capital of petitioner was $100,000,000. And there were outstanding shares having a par value of $67,049,500. As of January 1, 1930, its total invested capital was $132,196,275, and the volume of its business in 1929 was $153,530,041.

This is the statute in controversy, sec. 207 of the Tax Code of Virginia:

"Every foreign corporation, when it obtains from the State Corporation Commissison a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

"For a company whose maximum capital stock is fifty thousand dollars or less, thirty dollars:

"For a company whose capital stock is over fifty thousand dollars and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof;

"Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

[fol. 262] "Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, *two thousand dollars;*

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter to in-

crease its capital stock shall be considered its maximum capital stock." (Tax bill, sec. 38a; 1910, p. 77.)

This system of taxation has been in force in Virginia for more than thirty years. It has been twice assailed and twice sustained. General Railway Signal Co. v. Common-
[fol. 263] wealth, 118 Va. 301; affirmed, 246 U. S. 500; and Western Gas Construction Co. v. Virginia, 147 Va. 225; affirmed, 276 U. S. 597 (Mem.).

Charter fees for domestic corporations are assessed in substantially the same way, Tax Code, sec. 206,—smaller it is true than those charged foreign corporations for doing a domestic business. As might be expected, the State favors its own instrumentalities.

"In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." Hanover Fire Insurance Co. v. Carr, 272 U. S. 494.

After admission every foreign corporation and every domestic corporation, so far as taxes are concerned, stand upon a common footing. Tax Code, sec. 210.

It is conceded that some charge in the nature of an en-
[fol. 264] trance fee may be imposed. If this were not true domestic business would ultimately drift to foreign corporations. Why pay charter fees when they may be in this manner evaded?

If these fees are to be fixed by business thereafter done nothing may be collected. The corporation may become insolvent. It may finish its work and go. Doubtless these considerations influence the policy of the State, and it is not affected by the fact that other States may have followed different policies. Such considerations address themselves to the Legislature. Moreover, some classification is reasonable. It can not be contended that the power to assess an income tax makes it necessary to assess all incomes ratably.

If all the paid-in capital of a corporation was engaged in interstate business, any assessment against that capital would be a charge on interstate commerce, and for a stronger reason that objection could be urged against an assessment levied against the volume of its business.

In the instant case this tax is not even levied against authorized capital. The tax against the Standard Oil Company of New Jersey, whose capital exceeds many times that of petitioner, is but $5,000. The authorized capital is not taxed but is used as a measure for taxation.

A State may arbitrarily refuse entrance to a foreign corporation, although it can not, as a condition for admission, impinge upon rights guaranteed by the Federal Constitution. International Paper Co. v. Massachusetts, 246 U. S. 135. Hanover Fire Insurance Co. v. Carr, supra.

[fol. 265] "The power of the State to impose upon a foreign corporation a license fee or tax as a condition precedent to its entry into the State is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here." People v. Loughman, 249 N. Y. 369, 164 N. E. 253. Mr. Justice Cardozo was then a member of that court.

When a corporation has come into a State with its permission, has made investments and has built up a business, it has given hostages to fortune and can not then be told that it must submit to oppressive legislation or go.

Although it is not of major moment, we think the Commission was justified in finding that this corporation after it came could have no real difficulty in keeping separate accounts of its interstate and intra-state business.

If our statute imposes any direct burden upon interstate commerce, however small, it must fail, but it must in some form be a tax on property and not on privilege.

"It is settled that a State excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * * The turning point of these decisions is whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although [fol. 266] in form it may touch and in fact distantly affect it." Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290.

We have seen that it was sustained in General Railway Signal Co. v. Virginia. That case was argued on March 11, 1918, decided April 15, 1918, and is reported in 246 U. S. 500. It again came under review in Western Gas Construction Co. v. Virginia, 276 U. S. 597, and was again sustained in a memorandum decision on authority of the General Railway Signal Co. case. This was at the October Term, 1927.

If these decisions have not been overruled, our investigation is at an end, and if overruled, it must be by something since done. Certainly the court when they were handed down did not think that they were in conflict with principles previously approved.

It is not contended that this has been directly done, but it is contended that it has been done indirectly and by necessary inference. It is said that they follow Baltic Mining Co. v. Massachusetts, 231 U. S. 68, and that the principles there relied upon have since by that court been definitely disavowed. In support of this Cudahy Packing Co. v. Hinkle, 278 U. S. 460, is in major measure relied upon.

In considering this claim these principles are to be remembered. Repeal by implication is not favored and statutes are not lightly held to be unconstitutional.

In 1916 the Cudahy Packing Company, a Maine corporation, went into the State of Washington, and has since conducted there a "closely associated interstate and intrastate business." This entry was in all respects regular and

[fol. 267] met every statutory requirement. Its capital stock was then $20,000,000. By 1926 its authorization was increased to $45,000,000. It had acquired property worth $40,000, and its gross sales were $1,313,275. Less than one-half of it was intra-state. In 1925 that State by statute provided for a "filing fee," in principle quite like Virginia's "entrance fee." Its maximum limit was $3,000. An annual license fee with a $3,000 limitation was also imposed.

It was held that these charges were direct burdens upon interstate commerce and invalid.

The court said that unless saved by the $3,000 limitation the Constitutional objections pointed out in Looney v. Crane Co., 245 U. S. 178, were in point and should be applied. It, therefore, becomes necessary to see what were the facts and to see what was done in this Texas case.

The Looney case was first argued on May 3, 1916. It was reargued on November 6, 1917, and decided on December 10, 1917.

This, as we have seen, was but a short time before the General Railway Signal Company case has been argued and decided.

In Looney v. Crane Co., supra, these facts appear; The Crane Company was an Illinois corporation. In 1905 it filed with the Secretary of State for Texas its articles of incorporation, paid a decennial tax for the privilege of doing business there, and continued to pay all charges assessed against it until that suit was instituted. The statute of 1889 required that a copy of the charter be filed and that there be paid for a permit to do business a minimum tax of $25.00, based upon $100,000 of capital stock. It provided also for an increase predicated upon capital stock until a [fol. 268] maximum fee of $200 was reached.

In 1893 a franchise tax of $10.00 a year was levied on both domestic and foreign corporations. In 1897 this was changed as to domestic corporations, the minimum of $10.00 was retained and the maximum was raised to $50.00. As to foreign corporations the maximum was raised from $10.00 to $25.00 and the maximum limit was removed by fixing a percentage charge upon capital stock. By an act of 1907 "the surplus and undivided profits of the company became susceptible of being taken into view in addition to its authorized capital."

The authorized capital stock of the Crane Company was $17,000,000, paid up and issued. Its surplus and undivided profits was $8,139,000. Business done in Texas amounted to $1,019,750 for the year preceding the suit, divided about equally between State and interstate business, and at that time this company had invested there $301,197.

"In the same year in which the legislation was enacted providing for the taxation on the basis of surplus and undivided profits for the purpose of the franchise tax there was also enacted a law vastly increasing the amount of the permit tax. (Acts of 1907, S. S., p. 500; Revised Statutes, 1911, Art. 3837.) We say vastly increasing because, although the standard for the levy of that tax, the authorized capital stock, was retained, the maximum limit which was $200 for ten years under the previous law was removed and the percentages of levy on the authorized capital stock were so augmented that the permit for which the company paid to the Secretary of State $200 for ten years in 1905 [fol. 269] under the new law would have required the company to pay in order to do business in the State the sum of $17,040."

These taxes were held to be invalid.

This reference was made to the Baltic case in Cudahy Packing Co. v. Hinckle, supra:

"Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127, upheld a tax based upon authorized capital stock but limited to $2,000 imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the circumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the State was not taxed."

The Alpha Portland Cement Company v. Massachusetts, 268 U. S. 302, is also cited as sustaining the proposition that any direct tax, however small, which burdens interstate commerce is invalid. It deals with an annual excise tax on a foreign corporation engaged solely in interstate commerce.

In conclusion the court said:

"Whether, because reckoned upon authorized and not upon actual capital stock, the challenged legislation fails

to require like fees for equal privileges within the doctrine of Airway Electric Appliance Corp. v. Day, 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169, we need not now consider."

Here under review was not an entrance fee but an annual franchise tax levied against a corporation already admitted and based upon the mere number of authorized shares of [fol. 270] no par value stock.

These are all of the cases cited by the court in support of its conclusions.

They tell us that the amount of the tax is immaterial and that a maximum limit is not in itself necessarily the touchstone. To this extent the Baltic case is definitely overruled.

We are told that with the maximum limit out of the way the principles of the Looney case apply in the Cudahy case and govern.

When the General Railway Signal Company case was decided the Looney case had already been argued, re-argued and decided. Plainly the court did not then look upon them as being in conflict. The General Railway Signal Company case was near the border line but not over it, and to that effect the Looney case was cited. In the Cudahy case Mr. Justice Brandeis, dissenting, said: "The General Railway Signal Company case was decided by a unanimous court and the correctness of the decision has never been questioned." This statement, if unwarranted, would have been met in the court's opinion.

An entrance fee is to be distinguished from charges thereafter made. It may be taken or left. When burdens are afterwards imposed, the State in substance says, you must acquiesce or forfeit a built-up business.

In the Looney case the complaining company had been duly admitted, had paid all charges necessitated by admission, had made investments and had built up business. It was after this that additional invalid burdens were placed upon it.

When the Cudahy company began business in the State [fol. 271] of Washington no admission fee appears then to have been necessary or imposed. And it was not until many years later, after it, too, had made investments and built up business, that a "filing fee" and an "annual license fee" was called for.

As indicated, the narrow issue is this: Has the Cudahy case overruled the General Railway Signal Company case and the Western Gas Construction Company case? The issue is too serious to warrant us in believing that the Supreme Court with an opportunity to express itself would have been content to do this by inference only.

We have not undertaken to review the cloud of cases brought to our attention. "They beat down the mind and cloud with dust the vision." The opinion of the Commission alone covers one hundred and forty-seven printed pages.

For reasons stated, we are of opinion that the judgment of the State Corporation Commission should be affirmed, and it is so ordered.

Affirmed.

[fol. 272] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

Petition for Appeal to the Supreme Court of the United States, Assignments of Error and Prayer for Reversal

I

PETITION FOR APPEAL

The Atlantic Refining Company, the Appellant herein, considering itself aggrieved by the final judgment of the Supreme Court of Appeals of the State of Virginia, rendered on the 16th day of January, 1936, in the above entitled cause, presents this petition within three months thereafter and respectfully shows:

1. That said final judgment was in a suit in the highest court of the State of Virginia in which a decision could be had, in which there was drawn in question the validity of a statute of the State of Virginia on the ground of its being [fol. 273] repugnant to the Constitution of the United States, and the decision was in favor of its validity;

2. That the said statute, the validity of which was so drawn in question, was an Act of the General Assembly of Virginia approved February 26, 1910, providing for the imposition of certain entrance fees upon foreign corpora-

tions. (Acts of the General Assembly of the State of Virginia, 1910, Chapter 53, Section 38 a, page 79; Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930);

3. That the grounds of the asserted invalidity of said statute were that, as applied to Appellant in this case, it was repugnant to Clause 3, Section 8, Article I, of the Constitution of the United States, generally known as the Commerce Clause thereof, and to both the due process clause and the equal protection clause of the Fourteenth Amendment to said Constitution;

4. That therefore, in accordance with Rule 46, Section 2, of the Rules of the Supreme Court of the United States (286 U. S. 630), the Appellant respectfully shows the Court that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to-wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on writ of error as a matter of right;

Wherefore, Appellant prays for an allowance of an *of* [fol. 274] *an* appeal from the aforesaid final judgment to the Supreme Court of the United States.

II

Assignment of Errors

The Appellant assigns the following errors in the record and proceedings in said case:

1. That the said Supreme Court of Appeals of Virginia erred in giving judgment affirming the judgment of the State Corporation Commission and in sustaining the validity of said Act of the General Assembly of Virginia, approved February 26, 1910 (Section 207 of the Tax Code of Virginia);

2. That the said Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act deprived the Appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States;

3. That the said Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act constituted an illegal and an unlawful interference with and burden upon the Appellant's interstate commerce in contravention of Clause 3, Section 8, Article I of the Constitution of the United States;

[fol. 275] 4. That the said Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act denied the Appellant the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

III

Prayer for Reversal

For which errors the Appellant, The Atlantic Refining Company, prays that the said judgment of the Supreme Court of Appeals of Virginia dated the 16th day of January, 1936, in the above entitled cause, be reviewed and reversed, and that a judgment be rendered in favor of the Appellant, and for costs;

Appellant further prays that the Clerk of the Supreme Court of Appeals of the State of Virginia be directed to prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law.

Appellant herewith tenders costs bond in such sum as the Court may require.

This 31st day of March, 1936.

The Atlantic Refining Company, Appellant, by Oscar H. Price, T. Justin Moore, Lewis F. Powell, Jr., Counsel for Appellant.

[fol. 276] In Supreme Court of Appeals of Virginia

[Title omitted]

Order Allowing Appeal to the Supreme Court of the United States

The Appellant, the only petitioner in this cause before the State Corporation Commission and the only appellant in

this Court, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Appeals of the State of Virginia on the 16th day of January, 1936, and from each and every part thereof, and having presented and filed its petition for an appeal, assignments of error, and prayer for reversal, pursuant to the statutes and to the Rules of the Supreme Court of the United States in such case made and provided, it is hereby

Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the [fol. 277] Supreme Court of Appeals of the State of Virginia in the above entitled cause, as provided by law, and it is further

Ordered that the Clerk of the Supreme Court of Appeals of the State of Virginia shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same, together with all papers filed, in accordance with the Rules of the Supreme Court of the United States, to the Supreme Court of the United States, so that he shall have the same in said Court within not exceeding forty days from this date and from the date of signing the citation.

Appellant having tendered and filed a cost bond with good and sufficient surety conditioned as required by law in such cases made and provided, and in the sum of $1,000, said bond is accordingly hereby approved.

Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of the State of Virginia.

March 31st, 1936.

[fols. 278 & 279] Bond on appeal for $1,000.00, approved March 31, 1936, omitted in printing.

[fols. 280-338] Citation; in usual form, showing service on Abram P. Staples, omitted in printing.

[fol. 339] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of Appeals of Virginia:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of the record the following, and no other papers and exhibits, to-wit:

(1) The petition of The Atlantic Refining Company, Appellant, to the Supreme Court of Appeals of Virginia, from the order and decree of the State Corporation Commission of November 14, 1934, including Statement of Facts, Assignment of Errors, and Statement of Position.

[fol. 340] (2) The petition of The Atlantic Refining Company, with the verification thereof, filed with the State Corporation Commission of Virginia on April 26, 1930, praying refund of the sum of $5,000 theretofore paid by it under protest, including exhibits B and C filed with the petition. (All other exhibits filed with said petition, being exhibits A, D and E should be omitted from the record).

(3) The order of the State Corporation Commission, dated April 26, 1930, docketing said petition.

(4) The transcript of the evidence, including all statements of counsel, introduced before the State Corporation Commission on July 15, 1932.

(5) The stipulation of counsel dated October 20, 1933.

(6) The final order of the State Corporation Commission, dated November 14, 1934, denying and dismissing The Atlantic Refining Company's petition for a refund of said $5,000.

(7) The opinion of the State Corporation Commission by Fletcher, Commissioner, including Statement of Facts and Reasons.

(8) The opinion and judgment of the Supreme Court of Appeals of the State of Virginia dated and filed January 16, 1936.

[fol. 341] (9) The petition for an appeal from the Supreme Court of Appeals of the State of Virginia to the

United States Supreme Court, assignment of errors and prayer for reversal.

(10) The order of the Chief Justice of the Supreme Court of Appeals of Virginia allowing the appeal, and fixing and approving bond.

(11) The citation.

(12) The cost bond.

(13) All papers filed by the parties under the requirement and authority of Rule 12 of the Rules of the Supreme Court of the United States.

(14) This præcipe with proof of service.

(15) The stipulation as to transcript of record.

(16) Your certificate certifying the correctness of the transcript.

Said transcript to be prepared as required by law and the Rules of the Supreme Court of Appeals of Virginia, and the Rules of the Supreme Court of the United States, and to be filed in the Office of the Clerk of the Supreme Court of the United States, at Washington, on or before the 9th [fol. 342] day of May, 1936.

Dated this 2nd day of April, 1936.

Oscar H. Price, T. Justin Moore, Lewis F. Powell, Jr., Attorneys for the Appellant.

Service of the above præcipe accepted and acknowledged this 2nd day of April, 1936.

Abram P. Staples, Attorney General of Virginia and Counsel of Record for Appellee.

[fol. 343] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated by and between counsel for Appellant and Appellee that the Clerk of the Supreme Court of Appeals of Virginia shall include in the transcript of the record to be filed in the Supreme Court of the United States all those parts of the record and only those parts

designated in the præcipe of the Appellant filed and served herein.

Dated this 2nd day of April, 1936.

T. Justin More, Lewis F. Powell, Jr., Counsel for Appellant. Abram P. Staples, Attorney General of Virginia and Counsel for Appellee.

[fol. 344] Clerk's Certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

[fol. 345] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF, AS REQUIRED BY RULE 13, PARAGRAPH 9—Filed April 24, 1936

Comes now the Appellant in the above entitled cause and states that the points upon which it intends to rely in this Court are as follows:

Point 1. That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the judgment of the State Corporation Commission and in sustaining the validity of an Act of the General Assembly of Virginia, approved February 26, 1910. (Acts of the General Assembly of Virginia, 1910, Chapter 53, Section 38a, page 79; Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930.)

Point 2. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act deprived the Appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

[fol. 346] Point 3. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act constituted an illegal and an unlawful interference with and burden upon the Appellant's Interstate Commerce in contravention of Clause 3, Section 8, Article I of the Constitution of the United States.

Point 4. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act denied the Appellant the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Appellant respectfully represents that the whole of the record, as filed, is necessary for the consideration of the above mentioned points.

The Atlantic Refining Company, Appellant, by Oscar H. Price, T. Justin Moore, Lewis F. Powell, Jr., Counsel for Appellant.

Service of the foregoing statement of the points to be relied on by Appellant and of the parts of the record it thinks necessary for the consideration thereof pursuant to Rule 13, paragraph 9, is hereby accepted and the receipt of a copy thereof is hereby acknowledged for and on behalf of the Commonwealth of Virginia, Appellee, this 2nd day of April, 1936.

Abram P. Staples, Counsel of record for Appellee.

[fol. 347] [File endorsement omitted.]

Endorsed on cover: File No. 40,515. Virginia Supreme Court of Appeals. Term No. 40. The Atlantic Refining Company, appellant, vs. Commonwealth of Virginia. Filed April 24, 1936. Term No. 40, O. T., 1936.

FILE COPY

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APR 24 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 1

THE ATLANTIC REFINING COMPANY,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF [redacted] VIRGINIA.

JURISDICTIONAL STATEMENT OF APPELLANT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 961

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

JURISDICTIONAL STATEMENT OF APPELLANT.

The Atlantic Refining Company, Appellant, applicant herein for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of the State of Virginia, dated and filed on the 16th day of January, 1936, in accordance with the requirements of Rule 12, Paragraph 1, of the Rules of the Supreme Court of the United States (as amended March 2, 1936) herewith presents this separate typewritten statement as to the jurisdiction of the Supreme Court of the United States.

I.

Basis Upon Which it is Contended that the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Judgment in Question.

The judgment of the Supreme Court of Appeals of the State of Virginia, dated and filed on the 16th day of January, 1936, herein, is a final judgment in a suit in the highest court of the State of Virginia in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II.

The Statutory Provision Believed to Sustain the Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, 28 U. S. C. A. Section 344a, as in effect prior to and at the enactment of the Act of January 31, 1928, Chapter 14, 45 Stat. 54, 28 U. S. C. A., Sections 861a, 861b, and of the amendatory Act of April 26, 1928, Chapter 440, 45 Stat. 466, 28 U. S. C. A., Section 861b, and as amended by and pursuant to the provisions of the said two last mentioned Acts of the year 1928.

III.

The Statute of the State of Virginia, the Validity of Which is Involved.

The statute of the State of Virginia, the validity of which is involved, is an Act of the General Assembly of Virginia approved February 26, 1910, official volume Acts of the General Assembly of Virginia, 1910, Chapter 53, Section 38a, page 79 (Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930), entitled:

> "An Act to Amend and Re-enact Sections 37, 38 and 39 of the Act entitled An Act to raise revenue for the support of the Government and the public free schools and to pay the interest on the public debt * * * with reference to fees on foreign corporations authorized to do business in this State, and to add a section thereto designated as Section 38a."

All of said statute is pertinent to the questions here raised and is as follows:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:
>
> "For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;
>
> "For a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof;
>
> "Over one million dollars, and not to exceed ten million dollars, one thousand dollars;
>
> "Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

IV.

Date of Judgment Sought to be Reviewed and of Application for Appeal.

The judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was dated, filed and entered on the 16th day of January, 1936.

The application for appeal was presented on the 31st day of March, 1936.

V.

Nature of the Case and Rulings of the Court Bring the Case Within the Jurisdictional Provision Relied On.

Appellant, a Pennsylvania corporation, engaged in the marketing of gasoline and petroleum products in forty-seven States and several foreign countries, sought in 1930 to procure a certificate of authority to do a local business in the State of Virginia in conjunction with the interstate business it had theretofore conducted in that State for many years. Since 1924 Appellant, through the medium of subsidiary corporations, had also engaged continuously in intrastate business in the State of Virginia, and it was this intrastate business being conducted by its subsidiaries which Appellant desired to take over and operate in its own name.

Before being issued a certificate of authority under date of January 22, 1930, Appellant was required to pay, as a charge for the privilege of doing a local business in Virginia, the $5,000 entrance fee prescribed by said Act of the General Assembly of Virginia, approved February 26, 1910. (Said Act, the invalidity of which is asserted on this appeal, will hereinafter sometimes be designated as "Section 207".) *The amount of this charge was determined, pursuant to the provisions of Section 207, solely by the amount of Appellant's total authorized capital stock.* It was not based upon or related to the amount of capital employed or proposed to be employed by Appellant within the State of Virginia, nor did it have any relation to the value of the privilege or franchise to be exercised by the Appellant within the State of Virginia, or to the amount of business proposed to be done or property owned or proposed to be acquired and used by Appellant in that State.

The total number of shares of capital stock of the Appellant authorized and which might be issued, as of January 22, 1930, was 4,000,000 shares, all of which was common stock of the par value of $25 per share, making a total authorized capitalization of $100,000,000. Of this authorized capital there was issued and outstanding on said date only 2,681,980 shares, having a par value of $67,049,500. At the same time, the total invested capital of the Appellant amounted to $132,196,275 and during the calendar year 1929 its total volume of business aggregated $153,520,041, of which a most substantial part was interstate in character. *Of such total invested capital, only $262,580, or approximately one-fifth of one per cent thereof, was invested in Virginia on said date.* The volume of business done in said State during the calendar year 1929, including both its interstate and the intrastate business of its subsidiaries, amounted to $1,396,600, or only nine-tenths of one per cent of Appellant's total business for that year. Approximately two-thirds of the business done in Virginia was intrastate, and one-third thereof interstate.

On April 26, 1930, under and pursuant to the provision of Section 408 of the Tax Code of Virginia, as amended,[1] Appellant filed its petition with the State Corporation Commission of Virginia, asserting therein that Section 207 was unconstitutional and void and claiming a refund of said sum of $5,000 theretofore exacted from it, under protest. The sole grounds relied upon in said petition for a refund were stated therein as follows:

> "(1) The Act, Section 207, of the Tax Code of Virginia, under which said entrance fee is imposed in effect has deprived petitioner of its property without

---

[1] Acts of the General Assembly of Virginia, 1930, p. 917; Section 408 of the Tax Code of Virginia, Michie's Code, 1930.

due process of law, in violation of the provisions of the 14th Amendment of the Constitution of the United States, and of Section 2, Article I of the Constitution of the State of Virginia.

"(2) The enforcement of the aforesaid statutes, as applied in this case, denies petitioner the equal protection of law in violation of the 14th Amendment of the Constitution of the United States.

"(3) The enforcement of the aforesaid statutes constitutes an interference with commerce among the several States, the right to regulate which is by Clause 3, Section 8, Article I of the Constitution of the United States conferred upon the Congress of the United States, and, payment of said fee being required as a condition precedent to permitting petitioner to do any business in the State of Virginia, constitutes a burden upon interstate commerce.

"(4) Said entrance fee is based on the total authorized capital stock of petitioner, without any reference to the amount of stock issued and outstanding, or the actual or market value of said stock, or of the location in the State of Virginia and elsewhere of the property of petitioner, or to the amount of business of petitioner in the State of Virginia or elsewhere, and without reference to any reasonable or logical basis, said amount being wholly arbitrary, excessive and unreasonable and oppressive." (Printed Record before the Supreme Court of Appeals of Virginia, page 18).

It thus appears that the Federal questions sought to be reviewed on this appeal were clearly and explicitly raised at the very outset of this case. The alleged invalidity of Section 207 under the Constitution of the United States, for the reasons stated, constituted the sole basis for the claim for a refund.

No formal pleadings were filed by the Commonwealth of Virginia, but it was represented before the Corporation Commission of the State of Virginia by the Attorney Gen-

eral of that State in accordance with the provisions of the statute under which said petition for a refund was filed. After two hearings, and following the taking of the case under advisement for more than a year, after the second hearing, the State Corporation Commission entered a final order on November 14, 1934, denying and dismissing said petition for a refund. At the same time the Commission handed down an opinion, 147 printed pages long, in which it held that Section 207 of the Tax Code was constitutional, and that the imposition thereunder of the $5,000 tax upon Appellant did not deprive it of either the due process of law or the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States, and furthermore, that said imposition did not infringe the commerce clause of said Constitution.

An appeal from said final order of the State Corporation Commission to the Supreme Court of Appeals of Virginia was awarded Appellant by that court on May 8, 1935. The three principal assignment of errors relied upon were that the Commission had erred in failing to hold that the statute in question, as applied to Appellant, denied it due process and equal protection of the laws as aforesaid, and infringed the commerce clause of the Constitution of the United States. Thus again the three Federal questions sought to be reviewed on this appeal were squarely and explicitly raised in the Supreme Court of Appeals of Virginia by Appellant's assignment of errors to the action of the State Corporation Commission.[2] Each of these assignments of errors was relied upon by Appellant before the Supreme Court of Appeals of Virginia, both in its briefs and in oral

---

[2] For the full statement of the assignment of errors taken by Appellant in the Supreme Court of Appeals of Virginia to the action of the State Corporation Commission, see printed record before the Supreme Court of Appeals of Virginia, pp. 8 and 9.

argument. That court, in its opinion and final judgment rendered and entered on January 16, 1936, and here appealed from, affirmed the judgment of the State Corporation Commission and expressly sustained the validity of Section 207 of the Tax Code, and of the imposition made thereunder upon the Appellant.[3]

It appears, therefore, that under and by virtue of said Section 207 of the Tax Code of Virginia, the Appellant, a Pennsylvania corporation, has been compelled to pay to the State of Virginia an entrance fee of $5,000 for the privilege of doing an intrastate business in that State; that the amount of such imposition was determined, in accordance with the provisions of said Section 207, solely by the amount of Appellant's authorized capital stock, without regard to the amount of its capital employed, or proposed to be employed, within the State of Virginia, without regard to the business done or proposed to be done within that State, and wholly without regard to the value of the privilege or franchise to be exercised by the Appellant within said State of Virginia; that Appellant's capital stock represented its property located in forty-seven States and several foreign countries, as well as its entire business, both interstate and intrastate; that Appellant therefore contended, before the State Corporation Commission first and finally before the Supreme Court of Appeals of Virginia, that the imposition of the fee prescribed by said statute deprived it of its property without due process, since the amount of such fee was measured and determined by property beyond the taxing jurisdiction of the State of Virginia, denied it equal protection of the laws because it operated arbitrarily and un-

[3] Pursuant to the provisions of the Rules of this Court, Rule 12, Paragraph 1, Appellant appends hereto, marked "Appendix A", a copy of the opinion rendered below in this case by the Supreme Court of Appeals of Virginia.

equally as between foreign corporations seeking the same privilege within the State of Virginia, and unlawfully burdened its interstate commerce because the amount thereof was measured and determined by Appellant's total capital, representing its interstate, as well as its intrastate, business, all in contravention of the Constitution of the United States; and that the State Corporation Commission and finally the Supreme Court of Appeals of Virginia rejected the aforesaid contentions made by Appellant and squarely decided in favor of the validity of said statute.

Under such circumstances the only remedy remaining to Appellant is this appeal to the Supreme Court of the United States, and it is respectfully submitted that the nature of the case and the rulings of the Supreme Court of Appeals of Virginia, all as aforesaid, are such as to bring this case squarely within the jurisdictional provision relied on herein.

VI.

Grounds Upon Which it is Contended the Questions Involved are Substantial.

First. In holding that Section 207, as applied to Appellant, was not repugnant to the Constitution of the United States, the Supreme Court of Appeals of Virginia relied principally upon the decision in *General Railway Signal Company* v. *Virginia,* 246 U. S. 500. That case, decided in 1918, sustained the validity of this same section of the Virginia Tax Code (then designated as Section 38a, Chapter 53, Acts of the General Assembly of Virginia, 1910), holding that the fee imposed upon the General Railway Signal Company for the privilege of doing business in Virginia did not constitute an unlawful burden upon interstate commerce. *Whether such statute violated the Fourteenth Amendment was not before the court, since the Signal Company had made no claim, at any stage in the proceed-*

ings, that it had been deprived of its property without due process, or that it had been denied equal protection of the laws. The entire opinion of this Court on the validity of the statute in question follows:

> "It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.
>
> "Section 38a, c. 53, Acts of Virginia, 1910 (copied in margin) requires every foreign corporation with capital over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.
>
> "Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts, ante*, 135, and *Locomobile Co.* v. *Massachusetts, ante*, 146."

It will be observed from the foregoing that the provision in the Virginia statute for a maximum limit, and the fact that the fee prescribed by it did not vary in direct proportion to the authorized capital stock, were regarded as *"two characteristics • • • sufficient to save its validity". Yet even their presence did not keep the case from being on the "border line".*

Although *General Railway Signal Company* v. *Virginia, supra,* has not been expressly overruled,[4] Appellant contended before the State Corporation Commission and the Supreme Court of Appeals of Virginia, and now urges on this appeal that the subsequent decisions of this Court in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71; *Alpha Portland Cement Company* v. *Massachusetts,* 268 U. S. 203, and *Cudahy Packing Company* v. *Hinkle,* 278 U. S. 460, compel the conclusion that Section 207 is invalid today, and as applied to Appellant. Particular reliance is placed on *Cudahy Packing Company* v. *Hinkle, supra,* which is believed by Appellant to be determinative of the due process and commerce clause questions in the instant case.

The *Cudahy Packing Company* case, decided in 1929, held invalid the annual "license fee" and the single "filing fee" imposed by the State of Washington upon foreign corporations for the privilege of doing a local business in that State. The statutes in question were enacted in 1925, several years after the Cudahy Packing Company had first begun its intrastate business in Washington. Like the Virginia fee here in question, both of these Washington impositions were measured by total authorized capital stock, and neither of them varied directly with the amount thereof. Furthermore, the Washington statutes both contained maximum limits of $3,000 each, identical in principle

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[4] Nor has it ever been cited or followed by the United States Supreme Court on the constitutional question here in issue. The Supreme Court of Appeals of Virginia, in the opinion hereby appealed from, erroneously states that the *General Railway Signal Company* Case was followed on the question here in issue in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597. The only question presented to this Court, or in any way involved in that case, was whether the Construction Company was doing an intrastate business within Virginia.

to the $5,000 maximum limit prescribed by the Virginia statute.

The Cudahy Packing Company was a Maine corporation and, also like the appellant herein, had only a very small percentage of its total business in Washington. In 1927, that Company increased its authorized capital stock and thereby became liable for the "filing fee", which was a single fee imposed at the time of entrance into the State, and at such times thereafter as the corporation in question increased its authorized capital stock.[5] An injunction against the imposition of such fee was sought, the Packing Company asserting its invalidity upon identically the same grounds now being invoked by appellant herein. Following *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68,[6] a statutory three judge court upheld the validity of the Washington statutes in question. *Cudahy Packing Co.* v. *Hinkle*, 24 F. (2d) 124.

Upon appeal to this Court such holding was reversed, and the Washington filing fee, as well as its annual license fee, was held invalid. *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460. Since this filing fee was measured by total

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[5] This scheme is precisely paralleled by that in Virginia. Section 207 prescribes the fee charged at the time of entrance and Section 208 of the Tax Code of Virginia (Acts of the General Assembly of Virginia, 1906, p. 573, as amended in 1910, page 77, and as amended in 1926, p. 903) prescribes an additional fee after entrance whenever the foreign corporation increases its authorized capital stock. The schedule of fees contained in Section 207 determines the amount of the entrance fee as well as the amount of the subsequent fee following an increase in authorized capital.

[6] *General Railway Signal Co.* v. *Virginia, supra*, was also relied upon by the State of Washington, and was cited in the opinion of the District Court.

authorized capital stock, it was in legal effect a tax upon the Packing Company's entire business, including that which was interstate, and on its entire property, including that in other States.[7] Therefore, under a long line of decisions by this Court,[8] such fee was clearly unconstitutional *unless saved by the presence of the $3000 maximum limit.* As Mr. Justice McReynolds said:

> "Unless saved by the $3000 limitation, the Washington enactments are subject to the constitutional objections pointed out in Looney v. Crane Company, and must be denied effect."

This Court then proceeded to hold that the doctrine of *Baltic Mining Company* v. *Massachusetts, supra* (to the effect that a reasonable maximum limit saved a fee imposed upon foreign corporations measured by total authorized capital stock), was now "definitely disapproved", and that therefore the maximum limit did not save the Washington filing fee. Although the majority opinion in the *Cudahy Packing Company* case did not refer to *General Railway Signal Co.* v. *Virginia, supra,* Mr. Justice Brandeis pointed out in his dissenting opinion that the Washington filing fee held invalid was identical in principle to the entrance fee sustained in the *General Railway Signal Company* case. Appellant herein concurs in the view that the two impositions are identical in principle, and submits, therefore, that *Cudahy Packing Company* v. *Hinkle, supra,* requires that Section 207 of the Virginia Tax Code, as applied to appellant in this case, be held invalid.

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[7] *International Paper Co.* v. *Massachusetts,* 246 U. S. 135.

[8] *Western Union Tel. Co. v. Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146; *Looney* v. *Crane Co.,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Locomobile Company* v. *Massachusetts,* 246 U. S. 146.

The Supreme Court of Appeals of Virginia, in the decision which is the subject of this appeal, frankly recognized that the Washington "filing fee" held unconstitutional in the *Cudahy Packing Company* case was "in principle quite like Virginia's entrance fee". However, the Virginia court avoided the force and effect of that decision by drawing a distinction between an imposition imposed upon a foreign corporation at the time of entrance into the State, and one imposed thereafter upon an increase in its authorized capital stock, even though both impositions be imposed for the same privilege.[9] The Virginia court said:

> "An entrance fee is to be distinguished from charges thereafter made."[10]

Thus the decision which appellant is asking this Court to review holds that a fee for the privilege of doing a local business may be measured by the total authorized capital stock of the foreign corporation if imposed at the time of

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[9] The Attorney General of Virginia, in the brief filed in this case before the Supreme Court of Appeals of Virginia, took substantially the same view. He recognized that *Cudahy Packing Company* v. *Hinkle, supra,* was controlling, unless the State had a greater power to tax at the time of entrance than it did thereafter, even though in each instance the privilege taxed was the right to do a local business.

[10] This basis for sustaining Section 207, it will be noted, is entirely different from that relied on by the Supreme Court of Appeals and by this Court in sustaining this same statute in the *General Railway Signal Company* case. In that case, as has been pointed out, the presence of a maximum limit, plus the fact that the fee did not vary in direct proportion to the capital stock, was said to save its validity. The since repudiated *Baltic Mining Company* case, which had established this "maximum limit doctrine", was the authority followed.

entrance, but may not be so measured at any time thereafter.[11]

This is a unique reversion to an early misconception of the doctrine of the *Bank of Augusta* v. *Earle*, 13 Peter 519, and *Paul* v. *Virginia*, 8 Wall. 168. Although paying some lip-service to the doctrine of unconstitutional conditions at one place in its opinion, *the Virginia court has actually applied the now wholly repudiated view that the power to exclude a foreign corporation includes the power to impose any kind or character of condition upon its entrance.*

It is respectfully submitted that in so holding that a fee is valid if imposed upon entrance and that the same fee is invalid if imposed thereafter, the Virginia Court of Appeals has not only done violence to the doctrine of unconstitutional conditions, but also has thereby ignored the controlling decisions of this Court establishing that a condition may not be imposed upon entrance which would be invalid if imposed thereafter. See particularly:

Southern Pacific Co. v. *Denton*, 146 U. S. 202;
Terral v. *Burk Construction Co.*, 257 U. S. 529;
Frost Trucking Co. v. *Railroad Commission*, 271 U. S. 583;
Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494.

The doctrine of the foregoing cases has been adopted and succinctly stated by the authoritative *Restatement of the Law of Conflicts of Laws.*[12]

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[11] Under the decision of the Supreme Court of Appeals of Virginia, it will be noted that Section 207 is valid as to corporations seeking to enter the State of Virginia, but is invalid as to foreign corporations already doing an intrastate business but which increased their authorized capital stock.

[12] Adopted and promulgated as the final draft on May 11, 1934, by the American Law Institute. For a scholarly dis-

"A state of the United States cannot compel a foreign corporation, as a condition of doing or continuing to do business in the state, to relinquish rights secured by the Constitution of the United States (Section 170).

* * * * * * *

"Under the Constitution of the United States, a state cannot make a condition of a foreign corporation's doing business in the state the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the state" (Section 176). (Italics supplied.)

This holding of the Virginia Court is also squarely contrary to several excellent decisions by the highest courts in other States actually involving attempted impositions of fees measured by total authorized capital stock as a condition upon entering such States for the first time. *Perkins Manufacturing Co.* v. *Jordan,* 200 Calif. 667, 254 N. W. 551; *Badger* v. *Crockett,* 70 Utah 265, 259 Pac. 921; *Chicago, etc. Ry.* v. *Harman,* 89 Mont. 1, 295 Pac. 762; and see also *State* v. *Liggett & Myers Tobacco Co.,* 171 S. C. 511, 172 S. E. 857.[13]

Second. In showing that substantial Federal questions are involved in this appeal, we have heretofore undertaken

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cussion of the doctrine of unconstitutional conditions, concurring entirely with the views of the Appellant herein, see Henderson, the Position of Foreign Corporations in American Constitutional Law (1918), Chapter 8, pp. 134-143.

[13] These decisions were simply ignored by the Supreme Court of Appeals of Virginia with the terse remark that: "We have not undertaken to review the cloud of cases brought to our attention. They beat down the mind and cloud with dust the vision."

to demonstrate that the decision appealed from is contrary to the latest ruling by this Court on the subject, *Cudahy Packing Company* v. *Hinkle, supra,* and that the Supreme Court of Appeals of Virginia, in its effort to distinguish the *Cudahy Packing Company* case from the instant one, has undertaken to revitalize an interpretation of *Bank of Augusta* v. *Earle* and *Paul* v. *Virginia* which is now thoroughly discredited by subsequent decisions of this Court. Only the questions of burdening interstate commerce and taking property without due process were passed upon in *Cudahy Packing Company* v. *Hinkle, supra;* hence that decision, and the Virginia Court's treatment thereof, has no bearing upon Appellant's further contention that Section 207 denies it equal protection of the laws, which contention we shall now consider as presenting an additional Federal question of substance.

The authority principally relied upon in support of the alleged denial of equal protection of the laws is *Air-Way Electric Appliance Corporation* v. *Day, supra.* That case, decided six years after *General Railway Signal Company* v. *Virginia, supra,* held that the imposition of an annual license fee upon foreign corporations for the privilege of doing a local business is invalid as a denial of equal protection of the laws *where such fee is measured by total authorized capital stock.*

Although the Supreme Court of Appeals of Virginia did not deign to allude to the *Air-Way Electric Appliance Corporation* decision, the State Corporation Commission recognized in its opinion that inequality and discrimination inevitably exists where a fee, imposed upon foreign corporations for the privilege of doing a local business, is measured by total authorized capital stock.[14] However, the ef-

[14] As was said by this Court in the *Air-Way Electric Appliance Corporation* case, the mere number of authorized

fect of this admitted inequality was sought to be avoided by the State Corporation Commission upon the theory that a State owes foreign corporations seeking permission to do a local business no duty of equal protection of the laws. Thus the question presented is narrowed down to whether a State may impose an admittedly unequal and discriminatory entrance fee upon foreign corporations as a condition to their doing business in the State. The opinion of the Corporation Commission below answers this question affirmatively, holding that such corporations are not within the State's jurisdiction, and hence as between each other are not entitled to equal treatment upon entrance.

So far as we have been able to ascertain the question so presented has never been decided by this Honorable Court. *Air-Way Electric Appliance Corporation* v. *Day, supra,* although strongly persuasive, is not squarely in point, because there the foreign corporation in question had already been admitted to the State, and this Court has definitely decided that once admitted a foreign corporation is entitled to equal treatment not only with respect to other foreign corporations but also with respect to domestic corporations. *Southern Railway Co.* v. *Green,* 216 U. S. 400; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494. This Court has also held that foreign corporations not yet admitted are not entitled to equal treatment *with domestic corporations.* See *Hanover Fire Insurance Co.* v. *Harding, supra. Thus the question left open, and presented for the first time by this appeal, is whether foreign corporations seeking admission are entitled to rely upon the equal protection clause of the Fourteenth Amendment to prevent the imposition of arbitrary and unequal conditions.*

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shares "is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of * * * annual fees."

The only authorities which have been found bearing upon this question clearly support Appellant's view that although the State may exclude entirely it may not impose as a condition upon entrance a fee or tax which would amount to a denial of equal protection if the corporation were already within the State. *Perkins Manufacturing Co.* v. *Jordan, supra; American Law Institute, Restatement of the Law of Conflict of Laws,* Section 176; *Henderson, op. cit., supra,* Chapter 9, p. 160 *et seq.*; and *Colvert and Pyke, Taxation of Foreign Corporations,* 5 Cincinnati Law Review 54.[15]

Summary as to substantial Federal questions. It appears from the foregoing: (1) That the Supreme Court of Appeals of Virginia, in refusing to hold that Section 207 unlawfully burdened interstate commerce and operated to take Appellant's property without due process, has decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court; (2) that the said court, in refusing to hold that Section 207 violated the equal protection clause of the Fourteenth Amendment has also decided a Federal question of substance not heretofore determined by this Court; and (3) that the decision of said court, in sustaining the validity of Section 207, is squarely opposed to and in conflict with several recent decisions by the highest courts in other States.

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[15] See also: *O'Gara Coal Co.* v. *Emerson,* 326 Ill. 18, 156 N. E. 814 (1927); *Montgomery-Ward & Co.* v. *Becker,* 69 S. W. (2d) 674, 334 Mo. 789; *Great Northern Ry. Co.* v. *State,* 147 Wash. 630, 267 Pac. 506; *State ex rel. Borden Co.* v. *Dammann,* 198 Wisc. 265, 224 N. W. 139.

VII.

Cases Believed to Sustain Jurisdiction.

In support of its contentions that Section 207 operates as an unlawful burden upon interstate commerce and deprives it of property without due process of law, Appellant relies upon the following cases, *inter alia*:

Cudahy Packing Co. v. *Hinkle,* 278 U. S. 460;
Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203;
Locomobile Co. v. *Massachusetts,* 246 U. S. 146;
International Paper Co. v. *Massachusetts,* 246 U. S. 135;
Looney v. *Crane Co.,* 245 U. S. 178;
Ludwig v. *Western Union Tel. Co.,* 216 U. S. 146;
Pullman Co. v. *Kansas,* 216 U. S. 56;
Western Union Tel. Co. v. *Kansas,* 216 U. S. 1;
Perkins Mfg. Co. v. *Jordon,* 200 Calif. 667;
Badger v. *Crockett,* 70 Utah 265, 259 Pac. 921;
Minneapolis Steel & Machinery Co. v. *Crockett,* 263 Pac. 926, 71 Utah 211;
Chicago, etc. Ry. v. *Harman,* 295 Pac. 762, 89 Mont. 1;
State v. *Liggett & Myers Tobacco Co.,* 171 S. C. 511, 172 S. E. 857.

In support of its contention that Section 207 operates to deny it equal protection of the laws, Appellant relies upon the following cases, *inter alia*:

Air-Way Elec. App. Corp. v. *Day,* 266 U. S. 71;
Perkins Mfg. Co. v. *Jordon,* 200 Calif. 667;
O'Gara Coal Co. v. *Emerson,* 326 Ill. 18, 156 N. E. 814;
Montgomery Ward & Co. v. *Becker,* 69 S. W. (2d) 674; 334 Mo. 789.

Great Northern Ry. Co. v. *State,* 147 Wash. 630;
State ex rel. Borden Co. v. *Dammann,* 224 N. W. 139, 198 Wisc. 265;
Cf. *Roberts & Schaffer Co.* v. *Emerson,* 271 U. S. 50.

In support of its right to appeal to this Court, Appellant believes that the following cases sustain the jurisdiction:

Pacific Tel. & Tel. Co. v. *Tax Commissioner of the State of Washington,* 297 U. S. — (decided March 2, 1936);

Matson Navigation Co. v. *Board of Equalization of Calif.,* 297 U. S. — (decided March 2, 1936);

Schuylkill Trust Co. v. *Commonwealth of Pennsylvania,* 296 U. S. —, 80 L. Ed. 15 (Ad. Sh. decided Nov. 11, 1935);

Senior v. *Braden,* 295 U. S. 422, 429;

Aero Mayflower Transit Co. v. *Ga. Public Service Commission,* 295 U. S. 285;

Wiloil Corporation v. *Commonwealth of Penn.,* 294 U. S. 169;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board,* 294 U. S. 83;

Concordia Insurance Co. v. *Ill.,* 292 U. S. 535;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board,* 287 U. S. 295;

Advance-Rumley Thresher Co. v. *Jackson,* 287 U. S. 283;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83, 89;

Great Northern Ry. v. *Minn.,* 278 U. S. 503;

Nashville, C. & St. L. Ry. v. *White,* 278 U. S. 456;

Louisville & Nashville Ry. Co. v. *Melton,* 218 U. S. 36, 49.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal by virtue of said Section 237 of the Judicial Code, 28 U. S. C. A., Section 344a, as amended.

Respectfully submitted,

OSCAR H. PRICE,
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LEWIS F. POWELL, JR.,
Counsel for Appellant.

"APPENDIX A."

IN THE SUPREME COURT OF APPEALS OF VIRGINIA.

THE ATLANTIC REFINING COMPANY,

v.

COMMONWEALTH OF VIRGINIA.

From the State Corporation Commission of Virginia.

Richmond, Va., January 16, 1936.

OPINION BY JUSTICE HENRY W. HOLT.

The petitioner, a non-resident commercial corporation, has been assessed with an entrance fee as a condition precedent to the privilege of doing domestic business in Virginia. This entrance fee is paid under protest and claims that the statute imposing it is unconstitutional. In proper proceedings relief was sought before the State Corporation Commission and refused. Hence, this appeal.

In the opinion of the Corporation Commission is a full and satisfactory statement of facts, which we might with confidence adopt as written, but for brevity we shall restate those matters which in our judgment are of major importance and upon which this case turns.

Necessarily, we look to conditions as they were when this fee was paid. If it was then a proper charge it is not invalidated by subsequent proceedings, nor can such proceedings make good that which was once void.

Indeed if this entrance fee had not been paid at the time of entry it might never be paid. Insolvency might intervene. The petitioner might complete its work and withdraw before an assessment or levy could be made.

The Atlantic Refining Company is a Pennsylvania corporation and was chartered there in 1870. It refines petroleum and sells its products in forty-seven states, and in fourteen of them, Virginia now included, it maintains local stations

for the sale of its own products and of automobile accessories.

On January 7, 1930, petitioner gave notice to the Commission of its intention to do a general business in Virginia without first paying any entrance fee, suggesting, however, that it be permitted to pay this fee under protest. On January 13, 1930, the Commission replied that the company was at liberty to adopt its own procedure, but that domestic business done in Virginia without payment of an entrance fee would be at its peril. Payment was made under protest on January 17, 1930, and on January 22, 1930, the desired permit issued.

This litigation was properly begun on April 26, 1930, by petition addressed to the State Corporation Commission. It concludes with this prayer:

> "Wherefore, your petitioner prays that this Honorable Body may certify to the Comptroller of the State of Virginia that petitioner has paid into the State treasury an amount in excess of that required by law, to-wit: $5,000 on account of the entrance fee paid by the petitioner upon the granting of the certificate of authority to do business in the State of Virginia, and that the amount so paid may be refunded to petitioner, and that it may have all such other relief as to which it may be entitled."

Relief was refused.

Previous to the permit of January 22, 1930, this oil company had directly and indirectly for six years or more done an interstate business in Virginia. This the State did not undertake to hamper. It was not seeking permission to do something which it was already doing but permission to do something in addition, namely, to do directly and in its own name an intrastate business.

Mr. Serven, Assistant Comptroller in charge of domestic marketing, was asked and replied:

> "Q. In other words, the primary purpose in handling gas and oil products in Virginia is to supply what we might call the local Virginia business?
>
> "A. That is correct."

Before January 22, 1930, this Pennsylvania corporation had done directly an interstate business in its own name. It had done through the Red "C" Oil Company, a subsidiary Maryland corporation, which included the business of the Richmond Oil Company, an interstate and intrastate business, and it had done through the Atlantic Refining Company, a New York corporation, an intra-state business. Its volume in 1929 was:

"(1) Interstate business done by petitioner in its own name	$363,534
"(2) Business done by Red "C" Oil Company, both interstate and intra-state, but principally intra-state	$866,600
"(3) Business of Atlantic Refining Company, Inc., exclusively intra-state	$166,466
"Total	$1,396,600"

This is its statement of its business on January 1, 1930:

> "The only business in which petitioner was interested in the State of Virginia was the business, interstate and intrastate, of the Red "C" Oil Company and the interstate business conducted by petitioner in its own name; and the only property in Virginia in which petitioner was interested was the above described property belonging to Red "C" Oil Company having a value of approximately $262,580."

As of January 22, 1930, the total authorized capital of petitioner was $100,000,000. And there was outstanding shares having a par value of $67,049,500. As of January 1, 1930, its total invested capital was $132,196,275, and the volume of its business in 1929 was $153,530,041.

This is the statute in controversy, Sec. 207 of the Tax Code of Virginia:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of

authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

"For a company whose maximum capital stock is fifty thousand dollars or less, thirty dollars;

"For a company whose capital stock is over fifty thousand dollars and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof;

"Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

"Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such cerificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter

to increase its capital stock shall be considered its maximum capital stock" (Tax Bill, sec. 38a; 1910, p. 77).

This system of taxation has been in force in Virginia for more than thirty years. It has been twice assailed and twice sustained. *General Railway Signal Co.* v. *Commonwealth*, 118 Va. 301; affirmed, 246 U. S. 500; and *Western Gas Construction Co.* v. *Virginia*, 147 Va. 225; affirmed, 276 U. S. 597 (Mem.).

Charter fees for domestic corporations are assessed in substantially the same way, Tax Code, sec. 206, smaller it is true than those charged foreign corporations for doing a domestic business. As might be expected, the state favors its own instrumentalities.

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494.

After admission every foreign corporation and every domestic corporation, so far as taxes are concerned, stand upon a common footing, Tax Code, sec. 210.

It is conceded that some charge in the nature of an entrance fee may be imposed. If this were not true domestic business would ultimately drift to foreign corporations. Why pay charter fees when they may be in this manner evaded?

If these fees are to be fixed by business thereafter done nothing may be collected. The corporation may become insolvent. It may finish its work and go. Doubtless these considerations influence the policy of the state, and it is not affected by the fact that other states may have followed different policies. Such considerations address themselves to the Legislature. Moreover, some classification is reasonable. It can not be contended that the power to assess an income tax makes it necessary to assess all incomes ratably.

If all the paid-in capital of a corporation was engaged in interstate business, any assessment against that capital would be a charge on interstate commerce, and for a stronger reason that objection could be urged against an assessment levied against the volume of its business.

In the instant case this tax is not even levied against authorized capital. The tax against the Standard Oil Company of New Jersey, whose capital exceeds many times that of petitioner, is but $5,000. The authorized capital is not taxed but is used as a measure for taxation.

A state may arbitrarily refuse entrance to a foreign corporation, although it can not, as a condition for admission, impinge upon rights guaranteed by the federal constitution. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. *Hanover Fire Insurance Co.* v. *Carr, supra.*

> "The power of the state to impose upon a foreign corporation a license fee or tax as a condition precedent to its entry into the state is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here." *People* v. *Loughman,* 249 N. Y. 369, 164 N. E. 253. Mr. Justice Cardozo was then a member of that court.

When a corporation has come into a state with its permission, has made investments and has built up a business, it has given hostages to fortune and can not then be told that it must submit to oppressive legislation or go.

Although it is not of major moment, we think the Commission was justified in finding that this corporation after it came could have no real difficulty in keeping separate accounts of its interstate and intra-state business.

If our statute imposes any direct burden upon interstate commerce, however small, it must fail, but it must in some form be a tax on property and not on privilege.

> "It is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. * * * The turning point of these decisions is whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it." *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290.

We have seen that it was sustained in *General Railway Signal Co.* v. *Virginia.* That case was argued on March 11, 1918, decided April 15, 1918, and is reported in 246 U. S. 500. It again came under review in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597, and was again sustained in a memorandum decision on authority of the *General Railway Signal Co. case.* This was at the October Term, 1927.

If these decisions have not been overruled, our investigation is at an end, and if overruled, it must be by something since done. Certainly the court when they were handed down did not think that they were in conflict with principles previously approved.

It is not contended that this has been directly done, but it is contended that it has been done indirectly and by neces-

sary inference. It is said that they follow *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, and that the principles there relied upon have since by that court been definitely disavowed. In support of this *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, is in major measure relied upon.

In considering this claim these principles are to be remembered. Repeal by implication is not favored and statutes are not likely held to be unconstitutional.

In 1916 the Cudahy Packing Company, a Maine corporation, went into the State of Washington, and has since conducted there a "closely associated interstate and intra-state business". This entry was in all respects regular and met every statutory requirement. Its capital stock was then $20,000,000. By 1926 its authorization was increased to $45,000,000. It had acquired property worth $40,000, and its gross sales were $1,313,275. Less than one-half of it was intra-state. In 1925 that State by statute provided for a "filing fee", in principle quite like Virginia's "entrance fee". Its maximum limit was $3,000. An annual license fee with a $3,000 limitation was also imposed.

It was held that these charges were direct burdens upon interstate commerce and invalid.

The court said that unless saved by the $3,000 limitation the Constitutional objections pointed out in *Looney* v. *Crane Co.,* 245 U. S. 178, were in point and should be applied. It, therefore, becomes necessary to see what were the facts and to see what was done in this Texas case.

The Looney case was first argued on May 3, 1916. It was re-argued on November 6, 1917, and decided on December 10, 1917.

This, as we have seen, was but a short time before the *General Railway Signal Company* case had been argued, and decided.

In *Looney* v. *Crane Co., supra,* these facts appear: The Crane Company was an Illinois corporation. In 1905 it filed with the Secretary of State for Texas its articles of incorporation, paid a decennial tax for the privilege of doing business there, and continued to pay all charges assessed against it until that suit was instituted The statute of 1889 required that a copy of the charter be filed and that

there be paid for a permit to do business a minimum tax of $25.00, based upon $100,000 of capital stock. It provided also for an increase predicated upon capital stock until a maximum fee of $200 was reached.

In 1893 a franchise tax of $10.00 a year was levied on both domestic and foreign corporations. In 1897 this was changed as to domestic corporations, the minimum of $10.00 was retained and the maximum was raised to $50.00. As to foreign corporations the maximum was raised from $10.00 to $25.00 and the maximum limit was removed by fixing a percentage charge upon capital stock. By an act of 1907 "the surplus and undivided profits of the company became susceptible of being taken into view in addition to its authorized capital".

The authorized capital stock of the Crane Company was $17,000,000 paid up and issued. Its surplus and undivided profits was $8,139,000. Business done in Texas amounted to $1,019,750 for the year preceding the suit, divided about equally between State and interstate business, and at that time this company had invested there $301,197.

> "In the same year in which the legislation was enacted providing for the taxation on the basis of surplus and undivided profits for the purpose of the franchise tax there was also enacted a law vastly increasing the amount of the permit tax. (Acts of 1907, S. S., p. 500; Revised Statutes, 1911, Art. 3837.) We say vastly increasing because, although the standard for the levy of that tax, the authorized capital stock, was retained, the maximum limit which was $200 for ten years under the previous law was removed and the percentages of levy on the authorized capital stock were so augmented that the permit for which the company paid to the Secretary of State $200 for ten years in 1905 under the new law would have required the company to pay in order to do business in the State the sum of $17,040."

These taxes were held to be invalid.

This reference was made to the Baltic case in *Cudahy Packing Co.* v. *Hinkle, supra.*

> "*Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127, upheld a tax based upon authorized capital stock but limited to $2,000 imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and the limitation. Weighing all the circumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the state was not taxed."

The *Alpha Portland Cement Company* v. *Massachusetts,* 268 U. S. 302, is also cited as sustaining the proposition that any direct tax, however small, which burdens interstate commerce, is invalid. It deals with an annual excise tax on a foreign corporation engaged solely in interstate commerce.

In conclusion the court said:

> "Whether, because reckoned upon authorized and not upon actual capital stock, the challenged legislation fails to require like fees for equal privileges within the doctrine of *Airway Electric Appliance Corp.* v. *Day,* 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169, we need not now consider."

Here under review was not an entrance fee but an annual franchise tax levied against a corporation already admitted and based upon the mere number of authorized shares of no par value stock.

These are all of the cases cited by the court in support of its conclusions.

They tell us that the amount of the tax is immaterial and that a maximum limit is not in itself necessarily the touchstone. To this extent the Baltic case is definitely overruled.

We are told that with the maximum limit out of the way the principles of the Looney case apply in the Cudahy case and govern.

When the General Railway Signal Company case was decided the Looney case had already been argued, re-

argued and decided. Plainly the court did not then look upon them as being in conflict. The General Railway Signal Company case was near the border line but not over it, and to that effect the Looney case was cited. In the Cudahy case Mr. Justice Brandeis, dissenting, said: "The General Railway Signal Company case was decided by a unanimous court and the correctness of the decision has never been questioned." This statement, if unwarranted, would have been met in the court's opinion.

An entrance fee is to be distinguished from charges thereafter made. It may be taken or left. When burdens are afterwards imposed the State in substance says, you must acquiesce or forfeit a built-up business.

In the Looney case the complaining company had been duly admitted, had paid all charges necessitated by admission, had made investments and had built up business. It was after this that additional invalid burdens were placed upon it.

When the Cudahy Company began business in the State of Washington no admission fee appears then to have been necessary or imposed. And it was not until many years later, after it, too, had made investments and built up business, that a "filing fee" and an "annual license fee" was called for.

As indicated, the narrow issue is this: Has the Cudahy case overruled the General Railway Signal Company case and the Western Gas Construction Company case? The issue is too serious to warrant us in believing that the Supreme Court with an opportunity to express itself would have been content to do this by inference only.

We have not undertaken to review the cloud of cases brought to our attention. "They beat down the mind and cloud with dust the vision". The opinion of the Commission alone covers one hundred and forty-seven printed pages.

For reasons stated, we are of opinion that the judgment of the State Corporation Commission should be affirmed, and it is so ordered.

Affirmed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935

No. ~~961~~ [redacted] 1

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF ON BEHALF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION.

OSCAR H. PRICE,
T. JUSTIN MOORE,
LEWIS F. POWELL, JR.,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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Appellant,

vs.

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BRIEF ON BEHALF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION.

I.

Introduction.

This brief is submitted in reply to the statement filed herein by Appellee opposing the jurisdiction of this Court upon the asserted ground that no substantial Federal question is presented. In its Jurisdictional Statement heretofore filed pursuant to Rule 12, Paragraph 1, of the Rules of this Court (as amended March 2, 1936), Appellant has

carefully undertaken to state the "grounds upon which it is contended the questions involved are substantial", and this brief does not purport to be a reiteration of the matter contained therein. It is submitted strictly as a reply to Appellee on the jurisdictional issue, and the merits of this appeal are not argued herein except as incidental to the issue of whether a substantial Federal question is presented.

Appellee's Statement Opposing Jurisdiction is predicated solely upon the assertion that no such Federal question is raised by this appeal. There is no denial that appeal is the correct method of review here if any one of the constitutional questions involved is substantial. There is no denial that both the State Corporation Commission and the Supreme Court of Appeals of Virginia treated the questions of the constitutionality, under the Commerce Clause and under the Fourteenth Amendment, of the State statute involved as having been properly raised for their decision and as being determinative of the case. There is no denial that both the Commission and the court below passed upon the constitutional questions and determined them in favor of the validity of the State statute. There is no denial that the questions are properly preserved and brought here by the appeal papers; and there is no denial of the technical jurisdiction of this Court by this appeal under the Judicial Code.

The Court is referred to Appellant's jurisdictional statement for a statement of the nature of the case, the questions presented, and for copies of the statute involved and the opinion below.[1]

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[1] The opinion by the Supreme Court of Appeals of Virginia, hereby appealed from, has not yet been printed in the Virginia official reports. It has appeared, however, in 183 S. E. 243 (Advance Sheets).

II.

Decisions of This Court Subsequent to 1918 Reflect Significant and Controlling Developments in the Applicable Legal Principles.

In asserting the non-existence of a substantial Federal question, Appellee relies first upon *General Railway Signal Company* v. *Virginia,* 246 U. S. 500 (1918), in which this Court after stating that the case was "on the border line" held that the Virginia statute presently involved did not unlawfully burden interstate commerce.[2]

Appellee further contends that the legal principles applicable to fees measured by total authorized capital stock and imposed upon foreign corporations for the privilege of doing a local business were fixed and established in 1918 when the *Signal Company* case was decided, and that there have been no subsequent changes or developments in these principles. Appellee insists that such principles were "no longer open to controversy" even in 1918, and that therefore manifestly no substantial Federal question can exist today in a case of this kind.[3]

The General Railway Signal Company decision and its scope and significance has been adequately discussed by Appellant in its Jurisdictional Statement heretofore filed.

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[2] The two additional questions presented by this appeal, namely, whether said statute as applied to Appellant deprives it of its property without due process, and also denies it the equal protection of the laws, were neither involved nor considered in the *Signal Company* case.

[3] Appellee concludes its Statement Opposing Jurisdiction with the assertion that "it was subsequent to the establishment of 'the general principles' which are 'no longer open to controversy' that *General Railway Signal Co.* v. *Virginia, supra,* was decided."

Accordingly, this reply will be restricted to a demonstration of the unsoundness of Appellee's additional and more basic contention that there have been no developments in the applicable legal principles since 1918.

In the year 1918 this Court decided four cases involving fees measured by total authorized stock and imposed upon foreign corporations for the privilege of doing a local business. *International Paper Company* v. *Massachusetts,* 246 U. S. 135 (1918); *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146 (1918); *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147 (1918); and *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500 (1918). In two of these cases the statutes were sustained because of the presence of a reasonable maximum limit,[4] whereas in the other two the statutes, without maximum limits, were held unconstitutional.[5] *The Cheney Bros. Company* case involved the identical Massachusetts statute upheld in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68 (1913), and that precedent was squarely followed:

> "Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, *which was before the maximum limit was removed,* it follows from our decision in *Baltic Mining Co.* v. *Massachusetts* that the several objections based on the Constitution of the United States are all untenable * * * *."*[6]

The same Massachusetts statute, after the removal of the provision for a maximum limit, was sought to be applied to the two appellants in the *International Paper Company*

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[4] *Cheney Bros. Co.* v. *Massachusetts, supra,* and *General Railway Signal Co.* v. *Virginia, supra.*

[5] *International Paper Co.* v. *Massachusetts, supra,* and *Locomobile Co.* v. *Massachusetts, supra.*

[6] *Cheney Bros. Co.* v. *Massachusetts, supra,* at page 157.

and *Locomobile Company* cases. This single change in the statute was held sufficient to render it unconstitutional. Mr. Justice VanDevanter, speaking for the Court in the *Locomobile Company* case, said:

> "The tax is of a designated percent of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, part III, Section 56, was removed by Stat. 1914, c. 724, Section 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, and *Looney* v. *Crane Company*, 246 U. S. 178. This we have just decided in *International Paper Co.* v. *Massachusetts, ante* 135."

Thus, at the time *General Railway Signal Company* v. *Virginia, supra,* was decided, a few weeks following the foregoing decisions, this Court was apparently committed to the doctrine that a statute imposing a privilege tax upon foreign corporations and measured by total authorized capital stock was valid or invalid depending upon the presence or absence of a provision therein limiting the charge to a reasonable maximum amount. Since the Virginia statute involved in the *Signal Company* case had such a maximum limit provision, this Court expressly followed *Baltic Mining Company* v. *Massachusetts, supra,* just as it had done in the *Cheney Bros.* case.

The first clear departure from the view that the presence of a reasonable maximum charge would save an excise otherwise objectionable came seven years later in *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203 (1925), where the Court said:

> "The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the lan-

guage of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with the conclusions reached in later opinions and is now definitely disapproved."

It remained, however, for the decision in *Cudahy Packing Company* v. *Hinkle,* 278 U. S. 460 (1929), to squarely hold for the first time that the presence of a reasonable maximum limit did not save a fee measured by total authorized capital stock and imposed upon foreign corporations for the privilege of doing a local business.[7] That decision also reiterated and amplified the disapproval of *Baltic Mining Company* v. *Massachusetts, supra,* which case, it will be remembered, had been followed by *General Railway Signal Co.* v. *Virginia, supra.*

It is manifest from the foregoing that under the *Alpha Portland Cement Company* and *Cudahy Packing Company* cases, the presence of a maximum limit provision in a statute otherwise objectionable is now inadequate to save its validity, whereas in 1918, when the *Signal Company* case was decided, such a maximum limit was deemed adequate. It is also manifest that since 1918 the parent decision to *General Railway Signal Co.* v. *Virginia, supra,* namely, the *Baltic Mining Co.* case, has been thoroughly discredited and expressly disapproved by this Court.

Another recent and most significant development in the law applicable to fees measured by total authorized capital stock and imposed upon foreign corporations for the privilege of doing a local business is found in the decision

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[7] As pointed out in Appellant's Jurisdictional Statement, the Washington filing fee held invalid in the *Cudahy Packing Company* case is indistinguishable from the Virginia statute here assailed. See dissenting opinion, per Mr. Justice Brandeis in *Cudahy Packing Co.* v. *Hinkle, supra,* at p. 468.

of *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71 (1924), where this Court *for the first time* held that fees so measured offended the equal protection clause of the Constitution. That decision was rendered in 1924, six years after the time when appellee herein alleges that the law on this subject had become crystallized and "no longer open to controversy."

III.

Recent State Court Decisions Also Demonstrate That Significant and Controlling Developments in the Applicable Legal Principles Have Occurred Since 1918.

Not only have the developments heretofore noted occurred in the decisions of this Court since 1918, but also the uniform trend of recent decisions by the State courts is in accord with these developments.

The Supreme Court of California, in the leading State decision of *Perkins Manufacturing Co. v. Jordan*, 200 Calif. 667 (1927), expressly overruled its earlier decision in *Pick & Co.* v. *Jordan*, 169 Calif. 1. The earlier case had followed *Baltic Mining Co.* v. *Massachusetts, supra,* but in the *Perkins Manufacturing Company* case, the California court very correctly held that *Air-Way Electric Appliance Corp.* v. *Day, supra,* and *Alpha Portland Cement Co.* v. *Massachusetts, supra,* compelled a realignment of its views.[8] Thus, even without the additional clarification of *Cudahy Packing Co.* v. *Hinkle, supra,* which was not decided until 1929, the California court recognized that there had been significant and controlling developments in the law since 1918 when the *Baltic* case was still in good standing.

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[8] "The effect of this realignment of the Supreme Court of the United States is to necessarily overthrow our holding in the case of *Pick & Co.* v. *Jordan* * * *". *Perkins Mfg. Co.* v. *Jordan, supra,* at page 678.

A somewhat similar experience has been had in Montana where the recent case of *Chicago, etc., R. Co.* v. *Harman*, 89 Mont. 1 (1931) is contrary to an earlier Montana decision which had followed *Baltic Mining Co.* v. *Massachusetts, supra.*[9] The Supreme Court of Montana declined to follow *General Railway Signal Co.* v. *Virginia, supra,* properly classifying it with the discredited *Baltic Mining Co.* case, and noting that even in 1918 the *Signal Company* case had been "on the border line."

In each of the foregoing decisions the foreign corporation involved was entering the State for the first time, so that the charges in question were in effect entrance fees. Similarly, in *Badger* v. *Crockett*, 70 Utah 265 (1927), the Supreme Court of Utah interpreted the recent decisions of this Court in the same manner as did the highest tribunals in California and Montana, and accordingly held invalid the Utah entrance fee measured by authorized capital stock.[10]

A like fate met the entrance fee prescribed by South Carolina, when its Supreme Court followed *Cudahy Packing Co.* v. *Hinkle, supra,* in the recent dicision of *State* v. *Liggett & Myer Tobacco Co.*, 171 S. C. 511 (1933). The South Carolina Court expressed itself as follows:

> "Numerous earlier decisions of the Supreme Court of the United States are somewhat conflicting in their

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[9] *State ex rel. General Electric Co.* v. *Alderson*, 49 Mont. 29. For two intervening Montana decisions, see *J. L. Case Co.* v. *Stewart*, 60 Mont. 380, and *General Electric Co.* v. *Stewart*, 60 Mont. 387.

[10] The Utah annual license fee imposed upon foreign corporations for the privilege of continuing to do a local business was subsequently held invalid despite the presence of the maximum limit of only $750.00. *Minneapolis Steel & Machinery Co.* v. *Crockett*, 71 Utah 211 (1928).

holdings, but, as construing the Constitution, we feel constrained to follow the decision in the *Cudahy* case * * *."

For additional decisions in line with the foregoing, and which reflect and apply the recent developments in the decisions of this Court, see:

Montgomery Ward & Co. v. *Becker,* 334 Mo. 789 (1933);

State ex rel. Borden v. *Dammann,* 198 Wisconsin 265 (1929);

St. Louis-Southwestern Rwy. Co. v. *Emerson,* 30 F. (2d) 322 (C. C. A. 7th Circuit—1939). This case reversed the District Court decision, 27 F. (2d) 1005, which had squarely followed *General Rwy. Signal Co.* v. *Virginia, supra.*

St. Louis-Southwestern Rwy. Co. v. *Stratton,* 57 F. (2d) 211 (Dist. Court Illinois—1931).

IV.

Summary and Conclusion.

It is evident from the foregoing that the following significant developments have taken place since the "border line" decision of *General Railway Signal Co.* v. *Virginia, supra,* in the law applicable to fees measured by the total authorized capital stock of foreign corporations and charged for the privilege of doing, or continuing to do, a local business:

1. The decisions in *Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Cudahy Packing Co.* v. *Hinkle, supra,* renounced the doctrine, recognized as controlling in 1918, that the presence of a reasonable maximum limit saved the validity of an otherwise objectionable charge.

2. The decisions in these two cases "expressly disapproved" *Baltic Mining Co.* v. *Massachusetts, supra,* the parent decision to *General Railway Signal Co.* v. *Virginia, supra.*

3. The decision in *Air-Way Electric Appliance Corp.* v. *Day, supra,* held for the first time that authorized capital stock was an arbitrary, unequal and discriminatory measure for a charge upon foreign corporations, violative of the equal protection clause of the Constitution.

4. Decisions by the highest tribunals of several States, rendered since 1918, have, without exception,[11] held invalid statutes similar to the Virginia enactment here assailed, and in most instances have expressly recognized that significant changes and developments have recently occurred in the applicable legal principles.

It is respectfully submitted, therefore, that Appellee is palpably incorrect in asserting that the applicable legal principles were established in 1918 so as to be "no longer open to controversy", and that therefore "the appeal herein does not present a substantial Federal question".[12] On the contrary, as pointed out herein, there have been subsequent developments, evidenced by the decisions of this Court and expressly recognized and applied by the decisions of several State courts, which require that the Virginia statute here

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[11] The decision of the Supreme Court of Appeals of Virginia, from which this appeal is taken, represents the one exception. It is believed that such decision stands alone as the only case decided since 1918, and not subsequently overruled or reversed, which sustained a charge upon a foreign corporation measured solely by total authorized capital stock where such corporation had property situated in other jurisdictions, and was also engaged in interstate commerce.

[12] See Statement of Appellee Opposing Jurisdiction, page 5.

in question be held invalid. In any event, such subsequent developments at least present a situation within the rule stated in *Louisville & Nashville, R. R.* v. *Melton*, 218 U. S. 36, 49 (1909), where in refusing to dismiss a writ of error on the asserted ground that the question presented had been foreclosed by prior decisions and was, therefore, unsubstantial, this Court said:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. *We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous.*"[13] (Italics supplied.)

In concluding,[14] Appellant again refers the Court to the Jurisdictional Statement heretofore filed by it in this cause as containing a concise and accurate statement of the grounds upon which it is contended the questions involved

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[13] To same effect see: *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 710, at p. 717.

[14] Appellant deems it proper to point out that the opinion rendered below in this case by the State Corporation Commission of Virginia required 147 pages of the printed record filed in the Supreme Court of Appeals of Virginia, and the only questions considered therein were the constitutional ones now urged on this appeal. Manifestly, the State Corporation Commission believed that the questions here presented were substantial!

are substantial. Upon the grounds stated therein, as the same are supplemented hereby, the Appellant respectfully submits that the Federal questions presented are substantial, and that the judgment below should be reviewed and reversed by this Court.

Respectfully submitted,

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OCTOBER TERM, 1936

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Brief for Appellant

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 40

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA.

Brief for Appellant

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is officially reported in Volume 165 of the Virginia Reports beginning at page 492.

JURISDICTIONAL QUESTION

Appellant has heretofore filed, in conformity with Paragraph 1, Rule 12 of the Rules of this Court, its Statement of the grounds on which the jurisdiction of

this Court is invoked. In addition, Appellant has heretofore filed a brief in reply to Appellee's Statement Opposing Jurisdiction. On May 18, 1936, this Court postponed determination of the jurisdictional question raised, and entered the following order:

> "Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on its merits."

The only objection made by Appellee to the jurisdiction of this Court is the assertion that there is no substantial Federal question presented. Appellant respectfully refers the Court to the Statement filed by it pursuant to said Paragraph 1 of Rule 12, and to its brief in reply to Appellee's Statement Opposing Jurisdiction, for the reasons and authorities believed to demonstrate the existence of a substantial Federal question.

This brief will be limited to the merits of the case presented, although there necessarily will be some repetition of the matter heretofore presented on the jurisdictional question.

STATEMENT OF THE CASE

Appellant, a Pennsylvania corporation, engaged in the marketing of gasoline and petroleum products in forty-seven States and several foreign countries, sought in 1930 to procure a certificate of authority to do a local business in the State of Virginia, in conjunction with the interstate business it had theretofore conducted in that State for many years. Through the medium of subsidiary corporations, Appellant had also engaged continuously in intrastate business in the State of Virginia

since 1924, and it was this intrastate business being conducted by its subsidiaries which Appellant desired to take over and operate in its own name, together with its interstate business (R. 27-31).

Before being issued a certificate of authority under date of January 22, 1930, Appellant was required to pay, as a charge for the privilege of doing a local business in Virginia, the $5,000 entrance fee prescribed by an Act of the General Assembly of Virginia approved February 26, 1910.[1] (Said act, the invalidity of which is asserted on this appeal, will hereinafter sometimes be designated as "Section 207".)

Such $5,000 fee was paid by Appellant under protest and duress, and in order to avoid the penalties prescribed by Section 3848 of the Code of Virginia,[2] which said statute provides, among other things, for the imposition of a fine of not less than $10.00 nor more than $1,000.00 for each business transaction within the State by a foreign corporation which has not obtained a certificate of authority, and which further provides that no such corporation shall recover any money or property or enforce any contract in any court without first having obtained said certificate. Appellant also duly complied with the provisions of Section 3847 of the Code of Virginia[3] by

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[1] Acts of General Assembly of Virginia, 1910, Chap. 53, Sec. 38a, p. 79. This statute is now Sec. 207 of the Tax Code of Virginia, as contained in Michie's Code of Virginia, 1930, as amended.

[2] Acts of the General Assembly of Virginia, 1902-3-4, page 360; *ibid*, 1910, p. 425; *ibid*, 1926, p. 481; *ibid*, 1932, p. 407. This act may be found conveniently as Sec. 3848 of Michie's Code of Virginia, 1930, as amended.

[3] Acts of the General Assembly of Virginia, 1902-3-4, p. 360; *ibid*, 1910, p. 422; *ibid*, 1920, p. 565; *ibid*, 1926, p. 482. This act may be found conveniently as Section 3847 of Michie's Code of Virginia, 1930, as amended.

filing authenticated copies of its charter, by presenting to the State Corporation Commission a written power of attorney, and by presenting to that body a certificate from the Comptroller of the State of Virginia showing the payment into the treasury of said $5,000 fee (R. 15, 16, 25).[4]

On January 22, 1930, a certificate of authority to transact business within the State of Virginia was duly issued and delivered to the Appellant, which has, since that date, been engaged continuously in carrying on under its own name the general intrastate business of distributing and selling gasoline and petroleum products which had theretofore been carried on by Appellant's subsidiaries. Moreover, Appellant has continued to carry on within this State its interstate business (R. 16).

Since this appeal involves the validity of said Section 207, under which said sum of $5,000 was collected from Appellant, we shall now set forth in full the provisions of said statute:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:
>
> "For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;
>
> "For a company whose capital stock is over fifty thousand dollars and not to exceed one million dollars, sixty cents for each thousand dollars or fraction thereof;

[4] It will be noted from page 25 of the Record that the great majority of the allegations in Appellant's original petition were admitted by stipulation in open court.

"Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

"Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock." (Acts of 1910, p. 77; now Section 207 of the Tax Code.)

It is apparent from the provisions of the foregoing statute, and has not been disputed in this case, that the amount of the entrance fee charged Appellant by the State of Virginia was determined solely by the amount

of Appellant's total authorized capital stock. The fee so charged Appellant was not based upon or related to the amount of the capital employed or proposed to be employed by the Appellant within the State of Virginia, nor did it have any relation to the value of the privilege or franchise to be exercised by Appellant within that State, or to the amount of business proposed to be done or property owned or proposed to be acquired and used by Appellant in that State (R. 17, 53).

As of January 22, 1930, when the aforementioned certificate of authority was issued to Appellant, the total number of shares of capital stock of Appellant authorized and which might be issued was 4,000,000 shares, all of which was common stock of the par value of $25.00 per share, making a total authorized capitalization of $100,000,000. Of this authorized capital there was issued and outstanding on said date only 2,681,980 shares, having a par value of $67,049,500 (R. 16). At substantially the same time, the total invested capital of the Appellant amounted to $132,196,275, and during the calendar year 1929 its total volume of business aggregated $153,520,041, of which a most substantial part was interstate in character (R. 31).

Of such total invested capital, only $262,580, or approximately one-fifth of one per cent thereof, was invested in Virginia on said date. The volume of business done in said State during the calendar year 1929, including both its interstate and the intrastate business of its subsidiaries, amounted to $1,396,600, or only nine-tenths of one per cent of Appellant's total business for that year. Approximately two-thirds of the business done in Virginia was intrastate, and one-third thereof interstate (R. 31, 32).

The interstate and intrastate business of petitioner and its subsidiaries doing business in Virginia, at all times material hereto, has been conducted by the use of the same terminals, boats, barges, bulk and service stations, tank wagons and other facilities. Further, at all times, with respect to accounting and administrative control and operation there has not been any segregation of expense between interstate and intrastate business, because the same facilities, offices, officers, agents and employees have been engaged in interstate and intrastate business (R. 31, 61).

On April 28, 1930, under and pursuant to the provisions of Section 408 of the Tax Code of Virginia, as amended,[5] Appellant filed its petition with the State Corporation Commission of Virginia, asserting therein that Section 207, as applied to it, was unconstitutional and void and claiming a refund of said sum of $5,000 theretofore exacted from it, under protest (R. 46).

The grounds upon which Appellant claimed a refund were: (1) that it had been deprived of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the amount of said fee had been measured and determined by Appellant's total capital, representing its property located in other States and countries, and thus beyond the taxing jurisdiction of Virginia; (2) that it had been denied the equal protection of the laws guaranteed by said Amendment, in that said Section 207 operated arbitrarily and unequally as between foreign corporations seeking the same privilege within the State of Virginia; and (3) that

[5] Acts of the General Assembly of Virginia, 1930, p. 917; Section 408 of the Tax Code of Virginia, Michie's Code, 1930, as amended.

the imposition of said $5,000 charge unlawfully burdened interstate commerce, in that the amount thereof was measured and determined by Appellant's total capital, representing its interstate as well as its intrastate business (R. 19, 49).

After two hearings, and following the taking of the case under advisement for more than a year after the second hearing, the State Corporation Commission entered a final order on November 14, 1934, denying and dismissing said petition for a refund (R. 44). At the same time the Commission handed down a so-called opinion, 162 printed pages long (R. 45-207), in which it held that Section 207 as applied to Appellant violated no provision of the Constitution.

An appeal from said final order of the State Corporation Commission to the Supreme Court of Appeals of Virginia was awarded Appellant by that court on May 8, 1935 (R. 13). The three principal assignment of errors relied upon were that the Commission had erred in failing to hold that the statute in question, as applied to Appellant, denied it due process and equal protection of the laws, and infringed the commerce clause of the Constitution of the United States, all as aforesaid (R. 9).

Each of these assignments of errors was relied upon by Appellant before the Supreme Court of Appeals of Virginia, both in its brief and in oral argument. That court, in its opinion and final judgment rendered and entered on January 16, 1936, and here appealed from, affirmed the judgment of the State Corporation Commission and expressly sustained the validity of Section 207 of the Tax Code, and of the imposition made thereunder upon the Appellant (R. 208, 208-218).

SPECIFICATION OF ERRORS RELIED UPON

1. That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the judgment of the State Corporation Commission and in sustaining the validity of an Act of the General Assembly of Virginia, approved February 26, 1910. (Acts of the General Assembly of Virginia, 1910, Chapter 53, Section 38a, page 79; Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930.)

2. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act deprived the Appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act constituted an illegal and an unlawful interference with and burden upon the Appellant's Interstate Commerce in contravention of Clause 3, Section 8, Article I of the Constitution of the United States.

4. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act denied the Appellant the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

The fee imposed upon Appellant under Section 207 of the Tax Code of Virginia is measured solely by Appellant's authorized capital stock, which represents its property located in forty-seven States and several foreign countries, as well as its property used in both inter-

state and intrastate commerce. There is no apportionment of said fee to local business or property, and its amount bears no relation whatever to the privilege sought to be taxed, namely, the entering of the State of Virginia to do a local business.

Accordingly, Appellant submits that the imposition of the fee prescribed by said statute:

1. Deprived Appellant of its property without due process, since the amount of such fee was measured and determined by property beyond the taxing jurisdiction of the State. *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Looney* v. *Crane Co.,* 245 U. S. 178; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.

2. Unlawfully burdened interstate commerce, because the amount of said fee was measured and determined by Appellant's total capital, representing its interstate, as well as its intrastate, business in forty-seven States, and several foreign countries. *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Looney* v. *Crane Co.,* 245 U. S. 178; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.

3. Denied Appellant the equal protection of the laws, because said statute operated arbitrarily and unequally as between Appellant and other foreign corporations seeking the same privilege within the State. *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71.

Said Section 207 of the Tax Code of Virginia was before this Court in the case of *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500 (1918), and was there upheld although admitted to be on the "border line." However, the only question then presented to, or considered by, this Court was whether interstate commerce was burdened. Accordingly, that case constitutes no precedent upon the two additional questions here raised, namely, that as applied to Appellant, said statute operated to deny due process and equal protection of the laws.

In any event, however, the *Railway Signal Company Case* no longer constitutes a persuasive precedent even on the issue of burdening interstate commerce. Subsequent decisions of this Court have "expressly disapproved" *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68 (1913), upon the authority of which the *Railway Signal Company Case* was decided; and such subsequent decisions have also denied effect to the two "characteristics" of the Virginia statute said to save its validity in 1918. *Cudahy Packing Co.* v. *Hinkle, supra; Alpha Portland Cement Co.* v. *Massachusetts, supra.*

Moreover, since the decision of the *Railway Signal Company Case,* this Court has held for the first time that statutes of this type deny foreign corporations the equal protection of the laws. *Air-Way Electric Appliance Corporation* v. *Day, supra.*

Therefore, Appellant respectfully submits that said Section 207 is repugnant to three separate and distinct mandates of the Constitution of the United States.

In the argument which will now be presented, the denial of due process and the burdening of interstate commerce will, for convenience, generally be treated together in Sections I and II hereof, whereas the denial of equal protection will be discussed under Section III hereof.

ARGUMENT

I.

Historical Development and Analysis of Leading Authorities Supporting Appellant's View as to the Denial of Due Process and Burdening of Interstate Commerce.

(1) General Railway Signal Co. v. Virginia.

In holding that Section 207, as applied to Appellant, was not repugnant to the Constitution of the United States, the Supreme Court of Appeals of Virginia, in its opinion below, relied principally upon the decision in *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500.[6] That case, decided in 1918, sustained the validity of this same section of the Virginia Tax Code (then designated as Section 38a, Chapter 53, Acts of the General Assembly of Virginia, 1910), holding that the fee imposed upon the General Railway Signal Company for the privilege of doing business in Virginia did not constitute an unlawful burden upon interstate commerce.

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[6] It is interesting to observe that the Virginia Law Review has recently criticized the decision below. In a case note appearing in 22 Virginia Law Review, p. 958, (June, 1936), the following conclusion is reached: "It is believed that the court (Va. Court in Atlantic Refining Co. v. Commonwealth) relied too heavily upon *General Railway Signal Co.* v. *Virginia,* supra, which is practically emasculated by *Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Cudahy Packing Co.* v. *Hinkle, supra.* The court would have been more in line with later Supreme Court decisions had it held the statute unconstitutional either as an interference with interstate commerce or a denial of due process, and it would seem that a holding that the statute denied equal protection of the laws to foreign corporations would have been justified."

Whether such statute violated the Fourteenth Amendment was not before the Court, since the Signal Company had made no claim, at any stage in the proceedings, that it had been deprived of its property without due process, or that it had been denied equal protection of the laws. The entire opinion of this Court on the validity of the statute in question follows:

> "It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.
>
> "Section 38a, c. 53, Acts of Virginia, 1910 (copied in margin) requires every foreign corporation with capital over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars, and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.
>
> "Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott and Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, *ante*, 135, and *Locomobile Co.* v. *Massachusetts*, *ante*, 146."

It will be observed from the foregoing that the provision in the Virginia statute for a maximum limit, and the fact that the fee prescribed by it did not vary in direct proportion to the authorized capital stock, were regarded in 1918 as "two characteristics * * * sufficient to save its validity." Yet even their presence did not keep the case from being on the "border line".

Although *General Railway Signal Co.* v. *Virginia, supra,* has not been expressly overruled,[7] Appellant contended before the State Corporation Commission and the Supreme Court of Appeals of Virginia, and now urges on this appeal that the subsequent decisions of this Court in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71 (1924), *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203 (1925), and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460 (1929), compel the conclusion that Section 207 is invalid today as applied to Appellant.

Before discussing these subsequent decisions, it is illuminating to consider the state of the law as it existed in 1918 when the *General Railway Signal Company Case* was decided. Such consideration is necessary to an appreciation of the controlling weight attributed at that time to the presence in these statutes of provisions for "reasonable maximum limits."

The earliest Supreme Court decisions squarely pass-

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[7] Nor has it ever been cited or followed by the United States Supreme Court on the constitutional question here in issue. The Supreme Court of Appeals of Virginia, in the opinion here appealed from, erroneously states that the *General Railway Signal Company Case* was followed on the question here in issue in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597. The only question presented to this Court, or in any way involved in that case, was whether the Construction Company was doing an intrastate business within Virginia.

ing upon the validity of a privilege tax imposed upon foreign corporations and measured by total authorized capital stock are believed to be *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1 (1910), *Pullman Co.* v. *Kansas,* 216 U. S. 56 (1910), and *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146 (1910). In each of these three decisions, the State statute before this Court was held unconstitutional as the same was applied to the public service corporations involved.

Three years later, in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68 (1913), this Court upheld the Massachusetts statute imposing a privilege tax upon foreign corporations measured by total authorized capital stock, where the same contained a provision for a maximum limit to the tax. The earlier cases above mentioned were distinguished upon the ground that the Telegraph Company and the Pullman Company were engaged in the business of "commerce itself," whereas the Baltic Mining Company, a mere private concern, was not so engaged. They were further distinguished by emphasizing that, unlike the Kansas and Arkansas statutes involved in the earlier cases, the Massachusetts statute in the *Baltic Mining Company Case* contained a provision limiting "the tax to a maximum of $2,000."

The line of demarcation between valid and invalid privilege taxes imposed upon foreign corporations and measured by total authorized capital stock, was more sharply drawn by five cases decided by this Court during its 1917 term. *Looney* v. *Crane Co.,* 245 U. S. 178 (1917); *International Paper Co.* v. *Massachusetts,* 246 U. S. 135 (1918); *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146 (1918); *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147 (1918); and *General Railway Signal Co.* v. *Virginia, supra.*

In three of these, where no provision for a reasonable maximum charge was made, the statutes were held unconstitutional as burdening interstate commerce and as in effect taxing property beyond the jurisdiction of the States in question.[8] In the *Cheney Bros. Company* and *General Railway Signal Company Cases,* however, the statutes were sustained where each contained a provision fixing a maximum limit charge.

It is important to note the controlling effect given by this Court in 1918 to the presence or absence of a provision for a reasonable maximum limit on the fee prescribed. The *Cheney Bros. Company Case* involved the *identical* Massachusetts statute upheld in *Baltic Mining Co.* v. *Massachusetts, supra,* and that precedent was squarely followed:

> "Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, *which was before the maximum limit was removed,* it follows from our decision in *Baltic Mining Co.* v. *Massachusetts* that the several objections based on the Constitution of the United States are all untenable * * *." (Italics supplied.)[9]

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[8] *Looney* v. *Crane Co., supra, International Paper Co. v. Massachusetts, supra,* and *Locomobile Co.* v. *Massachusetts, supra.* It should also be noted that these cases, involving as they did ordinary commercial corporations, disposed of the assumption then being made by many of the State courts that the doctrine of *Western Union Telegraph Co.* v. *Kansas, supra,* was applicable only to public service corporations. Cf. *General Railway Signal Co.* v. *Virginia,* 118 Va. 301; and see, Powell, The Commerce Clause and State Tax Power, 22 Columbia Law Review 133, at p. 146.

[9] *Cheney Bros. Co.* v. *Massachusetts,* supra, at page 157.

The same Massachusetts statute, after the removal of the provision for a maximum limit, was sought to be applied to the two appellants in the *International Paper Company* and *Locomobile Company Cases. This single change in the statute was held sufficient to render it unconstitutional.* Mr. Justice VanDevanter, speaking for the Court in the *Locomobile Company Case,* said:

> "The tax is of a designated percent of the entire authorized capital, and *was imposed after the maximum limit* named in St. 1909, c. 490, part III, Section 56, *was removed* by Stat. 1914, c. 724, Section 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146, and *Looney* v. *Crane Co.,* 245 U. S. 178. This we have just decided in *International Paper Co.* v. *Massachusetts, ante,* 135." (Italics supplied.)

Thus, at the time *General Railway Signal Co.* v. *Virginia, supra,* was decided a few weeks following the foregoing decisions, this Court was apparently committed to the doctrine that a statute imposing a privilege tax upon foreign corporations and measured by total authorized capital stock was valid or invalid depending upon the presence or absence of a provision therein limiting the charge to a reasonable maximum amount. Since the Virginia statute involved in the *Signal Company Case* had such a maximum limit provision, this Court followed *Baltic Mining Co.* v. *Massachusetts, supra,* just as it had done in the *Cheney Bros. Case.*

In addition to relying upon the provision for a maximum limit in the Virginia statute, this Court in the *Signal Company Case* also said that the failure of the Virginia imposition to vary directly with the amount of capital stock was a "characteristic" which saved the statute from the unconstitutional side of the "border line."

As will now be pointed out, both of these "saving" characteristics have been abandoned by the subsequent decisions of this Court.

(2) The Controlling Case of Cudahy Packing Co. v. Hinkle.

The first clear departure from the view that the presence of a reasonable maximum limit would save an excise otherwise objectionable came seven years later in *Alpha Portland Cement Co.* v. *Massachusetts, supra.* There the company in question was engaged only in interstate commerce and the tax was measured by a combination of the total value of the capital shares attributed to transactions in Massachusetts and the proportion of net income attributed to such transactions. Hence, the case upon its facts is of no particular present significance. However, the argument was advanced, based upon *Baltic Mining Co.* v. *Massachusetts, supra,* that since the tax rate was small there was no unconstitutional burden upon interstate commerce. In disposing of this argument, the Court said:

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce

> Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. *The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Mining Co.* v. *Massachusetts, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."* (Italics supplied.)

Since no tax upon the privilege of doing an intrastate business measured by authorized capital stock was involved, the language above quoted from the *Alpha Portland Cement Company Case* has no controlling significance in itself. Yet such language is important because it represents the first authoritative declaration that any part of the *Baltic Case* was expressly and "definitely disapproved." The scope of this disapproval and whether it extended to an excise on a foreign corporation for the privilege of doing an intrastate business, when measured by authorized capital stock but with a maximum limit, remained undecided until 1929.

In that year in the controlling case of *Cudahy Packing Co.* v. *Hinkle, supra,* this precise question was before the Supreme Court for the first time since *Baltic Mining Co.* v. *Massachusetts, supra, Cheney Bros. Co.* v. *Massachusetts, supra,* and *General Railway Signal Co.* v. *Virginia, supra.* And up to that time no such statute *containing a maximum limit* had been struck down by the Supreme Court.[10]

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[10] Counsel for the State of Washington correctly said in their argument: "This court has never held invalid an excise graduated in accordance with the authorized capital stock of the corporation, where the corporation was engaged in intrastate business and where a reasonable maximum fee was provided for in the statute."

The decision to be announced in the *Cudahy Packing Company Case* had been foreshadowed, however. The broad base of principle had been cut from beneath the *Baltic Case* by the decisions in the *International Paper Company, Locomobile Company* and *Looney Cases,* leaving that case an illogical exception to the general rule; *General Railway Signal Co.* v. *Virginia, supra,* which had been decided upon the authority of the *Baltic Case,* had admittedly been "on the border line" when handed down in 1918; and *Alpha Portland Cement Co.* v. *Massachusetts, supra,* had given a prophetic warning against the saving efficacy of the characteristic which this Court seven years before had relied upon to distinguish the *Baltic Mining Company, Cheney Brothers Company* and *Signal Company Cases* from the *International Paper Company* and *Locomobile Company Cases.*

The *Cudahy Packing Company* decision held invalid the annual "license fee" and the single "filing fee" imposed by the State of Washington upon foreign corporations for the privilege of doing a local business in that State. The statutes in question were enacted in 1925, several years after the Cudahy Packing Company had first begun its intrastate business in Washington. Like the Virginia fee here in question, both of these Washington impositions were measured by total authorized capital stock, and neither of them varied directly with the amount thereof. Furthermore, the Washington statutes both contained maximum limits of $3,000 each, identical in principle to the $5,000 maximum limit prescribed by the Virginia statute.

The Cudahy Packing Company was a Maine corporation and, also like the Appellant herein, had only a very small percentage of its total business in Washington.

In 1927, that Company increased its authorized capital stock and thereby became liable for the "filing fee", which was a single fee imposed at the time of entrance into the State, and at such times thereafter as the corporation in question increased its authorized capital stock.[11]

An injunction against the imposition of such fee was sought in the District Court, the Packing Company asserting its invalidity upon identically the same grounds now being invoked by Appellant herein.

Squarely following *Baltic Mining Co.* v. *Massachusetts, supra,* which was held not to be overruled by subsequent decisions, two members of the Three-Judge District Court rendered separate opinions sustaining both the Washington filing fee and annual license fee. It appears from these opinions that counsel for the Cudahy Packing Company, because of the presence of a maximum limit in the Washington statutes, admitted the applicability of the *Baltic Case,* but contended that it had been repudiated by later decisions. The third judge sitting on the District Court, Judge Bourquin, demonstrated a keener perception of the moribund condi-

[11] This scheme is precisely paralleled by that in Virginia. Section 207 prescribes the fee charged at the time of entrance and Section 208 of the Tax Code of Virginia (Acts of the General Assembly of Virginia, 1906, p. 573, as amended in 1910, page 77, and as amended in 1926, p. 903) prescribes an additional fee after entrance whenever the foreign corporation increases its authorized capital stock. The schedule of fees contained in Section 207 determines the amount of the entrance fee as well as the amount of the subsequent fee following an increase in authorized capital. Thus, in view of the admitted controlling effect of the *Cudahy Packing Company Case* as to a filing fee imposed after entrance and upon an increase of authorized capital, it is clear that Sections 207 and 208 of the Virginia Tax Code are invalid as applied to increases in authorized capital after entrance.

tion of the *Baltic Case* than did his brethren, and dissented.[12]

When the case reached this Court, the question whether the maximum limits saved the two statutes involved was squarely met. Mr. Justice McReynolds said:

> "*Unless saved by the $3,000 limitation,* the Washington enactments are subject to the constitutional objections pointed out in *Looney* v. *Crane Co.*, and must be denied effect.
>
> "*Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, upheld a tax based upon authorized capital stock, but limited to $2,000, imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the circumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce, and that property beyond the State was not taxed.
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> "In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218, we said:
>
> " 'It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the

[12] In so dissenting, Judge Bourquin said: "It will be noted that considerable water has run under the bridge since the *Baltic Case*; and the latter is little more than a relic of a period of spirit and tendencies quite different from todays. That spirit and tendencies to which all courts are more or less responsive." See the case note in 27 Michigan Law Review 108, criticizing the majority opinion of the District Court.

> State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.' *Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.* It follows that the decree of the court below is erroneous and must be reversed." (Italics supplied.)

Although the majority opinion in the *Cudahy Packing Company Case* did not refer to *General Railway Signal Co.* v. *Virginia, supra,* Mr. Justice Brandeis pointed out in his dissenting opinion that the Washington filing fee held invalid was identical in principle to the entrance fee sustained in the *General Railway Signal Company Case.* Appellant herein concurs in the view that the two impositions are identical in principle, and submits, therefore, that *Cudahy Packing Co.* v. *Hinkle, supra,* requires that Section 207 of the Virginia Tax Code, as applied to Appellant in this case, be held invalid.

Manifestly, the *Cudahy Packing Company Case* completed the interment of the *Baltic Case* with its "maximum limit doctrine." [13]

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[13] For case notes and comments in the Law Reviews recognizing that the Baltic case exception to the doctrine of *Western Union Telegraph Co.* v. *Kansas* "is now definitely disapproved," see: 42 Harvard Law Review 952; 29 Columbia Law Review

Although not expressly mentioned in the opinion, it is equally obvious that such case eliminates any contention that a statute such as Section 207 of the Virginia Tax Code may be valid because the fee imposed does not vary directly with the amount of the authorized capital stock. It will be remembered that the Washington fees held invalid were both graduated in a manner similar to the Virginia fee here in question. They were not determined by a flat percentage of the capital stock as were the fees involved in the earlier decisions hereinbefore discussed.[14]

Thus, both of the characteristics said to save the validity of the Virginia statute in the *Signal Company Case* have been rendered inefficacious by the recent *Cudahy Packing Company Case,* which case, Appellant submits, is so squarely in point as to be determinative of this appeal in its favor.

834; 38 Harvard Law Review 361, 368; 27 Michigan Law Review 108; and see Powell, *op. cit. supra,* at p. 146. For decisions by State courts recognizing the repudiation of the *Baltic Company* doctrine, see *Perkins Manufacturing Co.* v. *Jordan,* 200 Calif. 667, 254 N. W. 551, (1928); *Minneapolis Steel & Machinery Co.* v. *Crockett,* 71 Utah 211, 263 Pac. 926 (1928); *Chicago, etc. Ry.* v. *Harman,* 89 Mont. 1, 295 Pac. 762 (1931); *Montgomery Ward & Co.* v. *Becker,* 334 Mo. 789, 69 S. W. 674 (1934); and *State* v. *Dammann,* 298 Wisc. 265, 224 N. W. 139 (1929).

[14] The unsoundness of a distinction between "a tax that is graduated smoothly as on a percentage basis, and one that is graduated in leaps and bounds" is clearly shown by the Louisiana case of *State* v. *Albert Mackie Co.,* 144 La. 339, 80 Sou. 582 (1919), wherein the *General Railway Signal Company Case* was fully discussed. To the same effect is *St. Louis-Southwestern Rwy. Co.* v. *Emmerson,* 30 Fed. (2d) 322, (C. C. A. 7th-1929), where the district court below, which had followed the *Signal Company Case,* was reversed.

(3) Other Authorities Cited in General Railway Signal Co. v. Virginia.

Counsel for the Commonwealth of Virginia, in the argument below, sought to support the present day soundness of *General Railway Signal Co.* v. *Virginia, supra,* by reliance upon *St. Louis-Southwestern Rwy. Co.* v. *Arkansas,* 235 U. S. 350 (1914), *Kansas City, etc., Rwy. Co.* v. *Kansas (Botkin),* 240 U. S. 227 (1916), and *Kansas City, etc., Railroad Co.* v. *Stiles,* 242 U. S. 111 (1916), which were cited by this Court in the *Signal Company* opinion. Reliance was so placed upon these authorities by opposing counsel because the *Baltic Mining Company Case,* the real parent decision to the *Signal Company Case,* had been expressly disapproved by this Court.

Although the Supreme Court of Appeals of Virginia, in the opinion below, did not mention such authorities, Appellant feels that it is proper to here point out the reasons why the three cases above named have no bearing today on the validity of a charge upon a *foreign corporation* measured solely by authorized capital stock.

St. Louis-Southwestern Railway Co. v. *Arkansas, supra,* may be disposed of briefly. An annual excise was imposed on foreign corporations for the privilege of doing a local business measured by the "proportion of *outstanding* capital stock * * * *represented by property owned and used in business transacted in the State.*" Such a measure studiously avoids any reference to extra-state property or to property used in interstate commerce; furthermore, since outstanding rather than authorized capital stock is used, it avoids the vice condemned in

Air-Way Elec. Appliance Corporation v. *Day, supra.* These are characteristics of a valid tax upon the privilege of doing a local business according to present day standards, and are conspicuous by their absence from the Virginia law. The opinion below by the State Corporation Commission recognized the vital differences between the Arkansas and the Virginia statutes, and frankly admitted that such case is "irrelevant."

The two remaining cases cited, *Kansas City, etc., Railway Co.* v. *Kansas (Botkin), supra,* and *Kansas City, Memphis & Birmingham Railroad Co.* v. *Stiles, supra,* while perhaps persuasive to some extent in the year 1918, have since definitely been removed as authorities pertinent to the validity of Section 207.

In the first place, it must be remembered that these two cases were both decided in 1916 when the scope of the recently announced doctrine of *Western Union Telegraph Co.* v. *Kansas, supra,* was not only undefined, but had been recently confused by the *Baltic Mining Company* decision.

Also the magic of the "smallness" of the imposition had not yet been dispelled by the later decisions in the *Alpha Portland Cement Company* and *Cudahy Packing Company Cases.* A $2,500 maximum limit was involved in the *Botkin Case,* and Mr. Justice Hughes expressly followed the *Baltic* doctrine, since repudiated, that a reasonable maximum limit saves a tax measured in part by property beyond the taxing power of the State, and used in interstate commerce. And although no such limit was prescribed in the Alabama statute sustained in the *Stiles Case,* this Court commented upon the reasonableness of the amount.

Another factor present in both the *Botkin* and *Stiles Cases,* which tends to eliminate them as persuasive precedents, is that the impositions in both cases were measured by issued and outstanding capital stock rather than total authorized capital stock. As early as 1916 the courts had not become as articularly conscious of the unreasonableness of measuring a tax by *authorized* capital as they have in more recent years. See *Air-Way Electric Appliance Corporation* v. *Day, supra,* and compare *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511 (1930). In *International Shoe Co.* v. *Shartel,* 279 U. S. 429, 433 (1929), where a franchise tax measured by outstanding capital stock and apportioned to the property owned in the State was sustained, Mr. Justice Stone was careful to say:

> "The tax is distinguishable from those considered in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71; *Looney* v. *Crane Co.,* 245 U. S. 178, and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state."

Finally, it is of the utmost significance in determining the weight of the *Botkin* and *Stiles Cases* as authorities supporting *General Railway Signal Co.* v. *Virginia, supra,* that *domestic* rather than *foreign* corporations were involved in both of them. The impositions sustained were annual franchise taxes upon *domestic* corporations measured by issued and outstanding capital stock. Because of a State's peculiar control and dominion over

corporations of its own creation, this Court has allowed unusual latitude in the taxation of the right to be a corporation and enjoy the franchise granted by the State of its incorporation. A part of this franchise is the right to issue stock, whereas the so-called franchise granted a foreign corporation to do a local business does not and cannot include such right. Thus, there *may* be a relation between the privilege conferred and the measure of the tax where a franchise tax on *domestic corporations* is measured by the amount of authorized capital stock, whereas there can be no such relation in the case of a tax upon *foreign corporations* measured by authorized capital stock.

This distinction was clearly brought out by Mr. Justice Stone's opinion in *Roberts & Schaffer Co.* v. *Emmerson,* 271 U. S. 50 (1926), where a *domestic* corporation sought in vain to invoke the doctrine of *Air-Way Electric Appliance Corporation* v. *Day, supra.*

Even as early as 1918 this distinction between foreign and domestic corporations must have been clearly recognized because otherwise it is difficult to reconcile the *Stiles Case* where no maximum limit was involved with the *Looney, International Paper Company,* and *Locomobile Company Cases, supra.* The *only* differences between the three cases last mentioned and the *Stiles Case* were (1) that the latter involved a domestic corporation, and (2) the tax upheld there was measured by outstanding rather than authorized capital. And these two points of difference alone enable a reconciliation between the *Botkin Case,* where a maximum limit existed, and *Cudahy Packing Co.* v. *Hinkle, supra.*

Writers in law reviews, commenting on the foregoing

Supreme Court decisions, entirely concur in the views which we have expressed above.[15]

In view of the foregoing, it is readily apparent that there is nothing whatsoever in *St. Louis-Southwestern Railway Co.* v. *Arkansas, supra, Kansas City, etc., Co.* v. *Botkin, supra,* or *Kansas City, Memphis & Birmingham R. Co.* v. *Stiles, supra,* which *today* justifies or in any way supports a reaffirmation of the "border line" decision of *General Railway Signal Co.* v. *Virginia, supra.*

[15] See the following case notes and comments: 76 University of Pennsylvania Law Review, 967, and notes; 26 Michigan Law Review, 190; 43 Harvard Law Review, 104, 107; and 29 Columbia Law Review, 834.

II

The Virginia Fee is Invalid Despite the Fact that It Was Imposed at the Time of Entrance.

(1) Position of the Court Below

The Supreme Court of Appeals of Virginia, in the decision which is the subject of this appeal, frankly recognized that the Washington "filing fee" held unconstitutional in the *Cudahy Packing Company Case* was "in principle quite like Virginia's entrance fee." However, the Virginia Court sought to avoid the force and effect of that decision by drawing a distinction between an imposition imposed upon a foreign corporation at the time of entrance into the State, and one imposed thereafter upon an increase in its authorized capital stock, even though both impositions be imposed for the same privilege.[16] The Virginia Court said:

> "An entrance fee is to be distinguished from charges thereafter made." [17]

Thus the decision which Appellant is asking this Court to reverse holds that a fee for the privilege of doing a

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[16] The Attorney General of Virginia, in the brief filed in this case before the Supreme Court of Appeals of Virginia, took substantially the same view. He recognized that *Cudahy Packing Co.* v. *Hinkle, supra,* was controlling unless the State had a greater power to tax at the time of entrance than it did thereafter, even though in each instance the privilege taxed was the right to do a local business.

[17] This basis for sustaining Section 207, it will be noted, is entirely different from that relied on by the Virginia Supreme Court of Appeals and by this Court in sustaining this same statute in the *General Railway Signal Company Case.* In that case, as has been pointed out, the presence of a maximum limit, plus the fact that the fee did not vary in direct proportion to the capital stock, was said to save its validity. The since repudiated *Baltic Mining Company Case,* which had established this "maximum limit doctrine," was the authority followed.

local business may be measured by the total authorized capital stock of the foreign corporation if imposed at the time of entrance, but may not be so measured at any time thereafter.[17(a)]

(2) The Position of the Court Below Ignores the Doctrine of Unconstitutional Conditions

This position by the Court below is a unique reversion to an early misconception of the decisions in *Bank of Augusta* v. *Earle,* 13 Peter 519, and *Paul* v. *Virginia,* 8 Wall. 168. Although paying some slight lip-service to the doctrine of unconstitutional conditions at one place in its opinion, *the Virginia Court has actually applied the now wholly repudiated view that the power to exclude a foreign corporation includes the power to impose any kind or character of condition upon its entrance.*

It is respectfully submitted that in so holding that a fee is valid if imposed at the time of entrance and that the same fee is invalid if imposed thereafter, the Virginia Court of Appeals has not only done violence to the doctrine of unconstitutional conditions, but also has thereby ignored the controlling decisions of this Court establishing that a condition may not be imposed upon entrance which would be invalid if imposed thereafter.

In *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, there was under consideration a Texas statute requiring a foreign corporation desiring to do business in the State to agree as a condition thereto that upon and after admission it would not remove any suit from a State court

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17(a) *People* v. *Loughman,* 249 N. Y. 369, (1928), is the only authority relied upon by the Virginia Court below in support of the unprecedented distinction it sought to apply. This New York case is not in point, as is readily seen upon an examination of the full opinion, and the statute involved. For an analysis of the New York statute, see Appendix, *infra* this Brief, pages 76-79.

to a Federal court. In holding such statute unconstitutional, the Supreme Court said:

> "But that statute, requiring the corporation, *as a condition precedent* to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions." (Italics supplied.)

This same doctrine was reaffirmed in the later case of *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922), where a State statute had required foreign corporations to waive their right to use the Federal courts as a condition precedent to procuring a license to enter to do business. In holding that such statute imposed an unconstitutional condition, Mr. Chief Justice Taft said:

> "The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, *exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does; whether state or interstate, although that has been suggested as a distinction in some cases.*" (Italics supplied.)

Perhaps the most thorough judicial analysis and discussion of a State's power to impose conditions precedent upon foreign corporations at the time of entrance is found in Mr. Justice Sutherland's opinion in the more recent case of *Frost Trucking Co.* v. *Railroad Commis-*

sion, 271 U. S. 583 (1925). The question actually involved there was whether a State, in the exercise of its admitted power to exclude the Trucking Corporation from the highways altogether, could attach, as a condition precedent to the granting of permission to use the highways, the responsibilities and duties of a common carrier. As will be seen from the following excerpts from the opinion, the cases involving the power of a State over the admission of foreign corporations were relied upon as the controlling authorities. The most pertinent part of Mr. Justice Sutherland's opinion follow:

> "The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement *as a condition precedent* to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question the constitutionality of the statute now under review will depend.
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> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other —the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made?
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> * * * * *
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> *"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such*

conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

"The prior decisions of this court amply justify this conclusion. In *Paul* v. *Virginia,* 8 Wall. 168, 181, the rule was stated to be that the state, having the power to exclude foreign corporations from its limits may admit them upon such terms and conditions as the state may think proper to impose. But in *Insurance Company* v. *Morse,* 20 Wall. 445, 456, it was said that this sweeping language must be understood with reference to the facts of that case; and that it could not be extended to include conditions repugnant to the Constitution and laws of the United States. In *Barron* v. *Burnside,* 121 U. S. 186, 197, this limitation was expressly reaffirmed.

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" 'Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.'

* * * * *

" '*For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution.* If this were otherwise, the

state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state, and, as we have pointed out, the state might thus deprive every corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. * * *

" '* * * While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution.' " (Italics supplied.)

After outlining the facts in *Western Union Telegraph Co.* v. *Kansas, supra,* Mr. Justice Sutherland then quoted the following:

" 'The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. *The company was not bound under, any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution.*'

"Since that decision, the same principle has been reiterated many times and never departed from. *Pullman Co.* v. *Kansas,* 216 U. S. 56, 63; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Herndon* v. *Chicago, Rock Island & Pacific Ry.,* 218 U. S. 135, 158; *Harrison* v. *St. L. & San Francisco*

R. R., 232 U. S. 318, 332; *Looney* v. *Crane Co.*, 245 U. S. 178, 187; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 142-143; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 114; *Public Utility Commrs.* v. *Ynchausti & Co.*, 251 U. S. 401, 404; *Terrall* v. *Burke Constr. Co., supra; Burnes Nat'l Bank* v. *Duncan*, 265 U. S. 17, 24; *Fidelity and Deposit Co. of Maryland* v. *Tafoya et al.*, 270 U. S. 426.

"And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it." (Italics supplied.)

It will be observed that Mr. Justice Sutherland, following earlier Supreme Court decisions, made no distinction whatsoever between the right of a State to impose conditions precedent at the time of entrance and the State's right to impose conditions precedent to the continuation of business after entrance.[18] *And it will also be noted that, in prescribing the rights which a corporation could not be required to surrender, he expressly referred to a corporation's "constitutional exemption from State taxation, direct or indirect, in respect of its interstate business and its property outside of the State."*

Thus, the foregoing decisions of this court, as they involve conditions imposed at the time of entrance which the corporation was under no compulsion to accept, squarely meet the position taken by the Court below and

[18] This Court has repeatedly held that a State does not relinquish its power to exclude, or impose constitutional conditions upon, foreign corporations merely because they have been once admitted to the State. In *National Council U. A. M.* v. *State Council*, 203 U. S. 151 (1906) it was held "that the power of the State as to foreign corporations does not depend upon their being outside of its jurisdiction."

demonstrate its fallaciousness. Applying the doctrine announced in these cases to the facts of this case, it is manifest that Virginia has no more right to measure its entrance fee by property used in interstate commerce, and by property located in other jurisdictions, than it would have to so measure a fee collected after entrance for the privilege of remaining to do a local business.

Appellant's capital stock represents its business, intrastate and interstate, in 47 States and several foreign countries; and it also represents Appellant's property located in these States and countries.[19] Regardless of *when* the tax is imposed, such capital stock cannot be made the basis of a State imposition.

(3) The Opinion Below is Contrary to the Rule Announced by the Restatement of the Law

Particular attention is called to the fact that the authoritative *Restatement of the Law of Conflict of Laws,* (adopted and promulgated May 11th, 1934, as the final draft), by the American Law Institute, announces unequivocally that a State may not impose conditions upon a corporation at the time of entrance which it could not impose thereafter:

> "A state of the United States cannot compel a foreign corporation, as a condition of doing or continuing to do business in the state, to relinquish rights secured by the Constitution of the United States (Section 170).
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> * * * * *
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> "Under the Constitution of the United States, a state cannot make a condition of a foreign cor-

[19] *Western Union Telegraph Co.* v. *Kansas, supra,* at page 30; *International Paper Co.* v. *Mass., supra,* at page 142.

> poration's doing business in the state the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the state." (Section 176.)

The foregoing excerpts from the Restatement purport to state the existing rule of law. In the "comment" appended to the statement of the rule, it is said:

> "The tax stated in this section may be invalid, for instance, because of its effect on interstate commerce, or because it regulates the amount of the tax by the value of land or chattels outside of the state, or for other reasons."

(4) The Decisions of This Court Involving Fees Measured by Authorized Capital Stock Refute Position of Court Below.

The validity of fees imposed upon foreign corporations for the privilege of doing a local business, and which have been measured by authorized capital stock, has been passed upon by this Court a number of times.[20] Several times the fees involved have been *annual* charges for the privilege of doing a local business; on other occasions the fees considered have been single entrance or

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[20] The most important decisions of this character have been: *Western Union Telegraph Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra; Ludwig* v. *Western Union Telegraph Co., supra; Baltic Mining Co.* v. *Massachusetts, supra; Looney* v. *Crane Co., supra; International Paper Co.* v. *Massachusetts, supra; Locomobile Co.* v. *Massachusetts, supra; Cheney Bros. Co.* v. *Massachusetts, supra; General Railway Signal Co.* v. *Virginia, supra; Air-Way Electric Appliance Corporation* v. *Day, supra;* and *Cudahy Packing Co.* v. *Hinkle, supra.*

filing fees imposed for the same privilege. In only one instance has it happened that the fee was imposed at the time of entrance rather than at a time thereafter.[21] However, in *all* of the cases involving the validity of such fees, this Court has sought to apply the same principles regardless of the time when the fee was collected, and regardless of whether it was an annual or a single fee. Or, stated conversely, this Court has never attributed significance to the *time when* the fee was collected. It has in every case simply sought to ascertain whether the imposition in effect reached property beyond the taxing jurisdiction of the State, whether it operated to burden interstate commerce, and whether it denied equal protection of the laws.

For example, the single filing fee held invalid in the *Cudahy Packing Company Case* happened to have been imposed when the company sought to increase its authorized capital after having come into the State. This fee was not held invalid because the Packing Company was already engaged in business in the State of Washington; its invalidity resulted from the attempt by Washington to measure such fee by property located in other jurisdictions, and by property used in interstate commerce.

Manifestly, the Packing Company's property in other jurisdictions and its property used in interstate commerce would have been no less taxed had the fee been imposed at the time the company entered the State rather than thereafter.

The earlier cases involving the validity of authorized capital stock as a measure for the privilege of doing a local business also clearly indicate that the time *when* the

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[21] *General Railway Signal Co.* v. *Virginia, supra.*

fee is imposed is of no significance on the issue whether the charge reaches property beyond the jurisdiction of the taxing State or property used in interstate commerce.[22]

Western Union Telegraph Co. v. *Kansas, supra,* involved a *single* "charter fee," measured by total authorized capital stock, which was imposed upon foreign corporations as a condition precedent to their doing, or continuing to do, any local business in Kansas. No *annual* franchise or license tax was involved. The statute in question had been passed after Western Union Telegraph Company had come into the State and begun its intrastate business, and hence in the case before the Court the single fee had been charged for the privilege of continuing to do a local business in Kansas. In holding that the fee imposed an unconstitutional condition upon the telegraph company, the Court said:

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given percent *of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the state, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state.* The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based

[22] As to whether the *time when* the fee is charged affects the issue of equal protection of the laws will be considered *infra,*

on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given percent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given percent of its whole authorized capital, representing all of its property and all of its business and interests everywhere.

* * * * *

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given percent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. *Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a percent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance."* (Italics supplied.)

It is entirely clear from reading the Kansas statutes, as well as the Court's opinion, by Mr. Justice Harlan, that no distinction was contemplated between the imposing of such a fee upon a corporation which happened to have begun business before the enactment of the law and the imposing of the same fee upon a corporation which desired to come in subsequent to such enactment.

The right to exclude foreign corporations, so emphasized by the opinion below, is not and never has been limited to foreign corporations which are "outside" the State at the time the State undertakes to exercise this right. This has been decided many times but for a case particularly involving Virginia, reference may be made to *National Council U. A. M.* v. *State Council,* 203 U. S. 151 (1906), (affirming 104 Va. 197), where the Supreme Court, in speaking of the power of the Virginia Legislature with respect to a foreign corporation already *within the State,* unequivocally said:

> "The State of Virginia had the undoubted right to exclude the Pennsylvania corporation and to forbid its constituting branches within the Virginia boundaries. *As it had that right before the corporation got in, so it had the right to turn it out after it got in.*
>
> * * * * *
>
> "* * * *the power of the State as to foreign corporations does not depend upon their being outside of its jurisdiction.*" (Italics supplied.)

Manifestly, therefore, the fact that Western Union Telegraph Company was already doing a local business in Kansas, was of no significance. There is language in the concurring opinion in the *Western Union Company Case* by Mr. Justice White which gives importance to

the fact that the telegraph company was doing an interstate business both in and out of Kansas at the time the charter fee was imposed. Although later decisions do not follow Mr. Justice White's views, it should be noted here that Appellant, like Western Union Telegraph Company, had for many years prior to the imposition of the fee presently involved, been actively engaged in interstate commerce in forty-seven States, *including Virginia,* and in numerous foreign countries.

Pullman Co. v. *Kansas, supra,* and *Ludwig* v. *Western Union Telegraph Co., supra,* are two additional Supreme Court decisions which hold invalid *single* fees measured by authorized capital stock, and imposed upon foreign corporations as a condition to the doing, or continuing to do, of an intrastate business. The facts in both of these cases were quite similar to those in *Western Union Telegraph Co.* v. *Kansas, supra,* and need not be reviewed here. No distinction was made in either of them between single entrance fees and charges imposed thereafter for the privilege of doing a local business.

In *International Paper Co.* v. *Massachusetts, supra,* the Supreme Court summarized certain general principles applicable to cases of this kind, which summary is frequently cited. A careful reading thereof demonstrates that no distinction was made between fees imposed at the time of entrance and those imposed thereafter:

> "A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, *although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein,* is essentially and for every

practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state." (Italics supplied.)

Finally, no such distinction as the court below has undertaken to draw was made either by this Court or by the Virginia Court in deciding the *General Railway Signal Company Case* in 1918. In short, this alleged distinction, based upon the time when a fee is imposed, is now urged for the first time in an effort to avoid the otherwise controlling effect of the recent decision in *Cudahy Packing Co.* v. *Hinkle, supra.*

(5) Decisions of State Courts Also Refute Position of Court Below.

There have been a number of recent decisions by the highest courts in other States which squarely support Appellant's position, and which therefore refute the position taken by the Virginia Court below as to the existence of a controlling distinction between fees imposed at the time of entrance and those imposed thereafter.

These State court decisions were presented to the court

below, but apparently were ignored.[23] While of course in no way binding upon this Court, these decisions from California, Missouri, Montana, South Carolina, Utah, and Wisconsin, which have all been rendered recently, reflect the views of many able and impartial judges as to the constitutionality of authorized capital stock as a measure for a privilege tax on foreign corporations under circumstances substantially similar to those presently involved. These judges, with the *Railway Signal Company Case* and the other adjudications of this Court before them, have undertaken to determine and apply the law as they found it reflected in the decisions of the Supreme Court of the United States. Certainly their studied judgments in cases incapable of sound distinction from that presently before this Court, are entitled to great weight.

Moreover, if the decision of the Court below is permitted to stand, the authority of each of these other State decisions will be open to fresh attack. Once again the law on this subject will be thrown into a confused state such as that produced for a time by the Baltic Mining Company decision.[24]

For these reasons, and perhaps at the risk of tediously

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[23] Apparently referring to these decisions by other State Courts, the Court below said: "We have not undertaken to review the cloud of cases brought to our attention. 'They beat down the mind and cloud with dust the vision.'" *The Atlantic Refining Co.* v. *Commonwealth*, 165 Va. 492, at p. 504.

[24] A careful search has failed to disclose a single State authority which supports the decision below. It is believed that such decision by the Virginia Court stands alone as the only case decided since 1918, and not subsequently overruled or reversed, which sustained a charge upon a foreign corporation measured solely by total authorized capital stock, where such corporation had property situated in other jurisdictions, and was also engaged in interstate commerce.

prolonging this brief, we now submit a review of several of these State decisions.

Perhaps the leading such case is *Perkins Manufacturing Co.* v. *Jordan,* 200 Calif. 667 (1927) decided by the Supreme Court of California. The statute there involved required foreign corporations upon entering to do a local business, and annually thereafter, to pay a fee measured on a graduated basis by authorized capital. *The fee so imposed did not vary in direct proportion to authorized capital stock, and there was a maximum limit of $1,000 where the authorized capital was $10,000,000 or more.* Perkins Manufacturing Company, *a foreign corporation not theretofore engaged in business in California,* sought to procure a certificate of authority to do a local business but declined to pay the license fee demanded by the State. The State refused a certificate and mandamus proceedings were instituted. The California court's summary of the characteristics of the fee involved may well have been written concerning Section 207 of the Virginia Tax Code. The characterization fits perfectly:

> "It will be noted that this fee is in nowise regulated by either the amount of property owned, capital employed or business done within the state. Indeed, it bears no relation whatever to the property owned, capital employed, or business volume of the corporation either in or out of the state or at all. The tax is predicated solely upon the authorized capital stock of the corporation and is wholly without relation to any other standard. Again, the corporation thus taxed may never issue the amount of stock authorized and, if it does, it may employ the whole thereof in its business elsewhere than in California. A corporation with a small amount of

authorized capital stock may be doing an immense business in California and be required to pay only a small privilege tax, whereas, on the other hand, a corporation with a large authorized capital stock may be doing an insignificant amount of business in California and under this act be required to pay a larger privilege tax."

In addressing itself to the argument that a fee charged upon admission is different from a fee collected thereafter, the Court soundly said:

> *"There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon interstate commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the Supreme Court of the United States of the necessary effect and consequences of the state statute."* (Italics supplied.)

It is also of interest to note that in the foregoing case, the California Supreme Court overthrew its prior decision of *Pick & Co.* v. *Jordan,* 169 Calif. 1, 145 Pac. 506, (1916), which decision had followed *Baltic Mining Co.* v. *Massachusetts, supra.* In the *Perkins Manufacturing Company Case,* the court also reviews at length the course of the decisions by this Court on this question, and concludes with prophetic insight (before *Cudahy Packing Co.* v. *Hinckle* was decided) that *International Paper Co.* v. *Massachusetts, supra; Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Air-Way Electric Appliance Corp.* v. *Day, supra,* had in effect overruled the *Baltic*

Case and "realigned" the Supreme Court in accord with *Western Union Telegraph Co.* v. *Kansas, supra.* The California court said:

> "These decisions re-align the court in accord with such previous decisions as *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1 (54 L. Ed. 355, Sup. Ct. Rep. 190), *Pullman Co.* v. *Kansas*, 216 U. S. 56 (54 L. Ed. 378, 30 Sup. Ct. Rep. 232), *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146 (54 L. Ed. 423, 30 Sup. Ct. Rep. 280), *Atchison, etc. Ry. Co.* v. *O'Connor*, 223 U. S. 280 (Ann. Cas. 1913C, 1050, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216), *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (18 Ann. Cas. 1103, 27 L. R. A. (N. S.) 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481), *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205 (57 L. Ed. 189, 33 Sup. Ct. Rep. 41), and produce harmony between those decisions and the following cases: *Looney* v. *Crane Co.*, 245 U. S. 178 (62 L. Ed. 230, 38 Sup. Ct. Rep. 85), *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 (Ann. Cas. 1918C, 617, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292), *Air-Way, etc. Corp.* v. *Day, supra*, and *Alpha Portland Cement Co.* v. *Massachusetts, supra.*
>
> "The so-called *Baltic-Dental Case (Baltic Mining Co. & S. S. White Mfg. Co.)* v. *Commonwealth of Massachusetts*, 231 U. S. 68 (58 L. Ed. 127, 34 Sup. Ct. Rep. 15), has in some respects been distinguished, in other respects definitely overruled. See *Looney* v. *Crane Co., supra*, and *Alpha Portland Cement Co.* v. *Massachusetts, supra.*
>
> "The effect of this re-alignment of the Supreme Court of the United States is to necessarily overthrow our holding in the case of *Pick & Co.* v. *Jordan*, 169 Cal. 1 (Ann. Cas. 1916C, 1237, 145 Pac. 506), and to revive the doctrine announced in

the case of *Mulford* v. *Curry*, 163 Cal. 276, (125 Pac. 236). We accord to the legislature a sincere effort to frame a law that was just so far as the amount of the charges to foreign corporations desiring to enter our state for intrastate business was concerned, and the legislature, no doubt, acted in perfect good faith, relying upon the validity of the decision in the case of *Pick & Co.* v. *Jordan, supra*, but in view of the holding of the United States Supreme Court above announced, that a law on this subject in order to be valid must bear at least some relation to property owned and used and business carried on or proposed to be carried on within the state of California, we must bow to the supremacy of the Federal Constitution in this matter as interpreted by the highest court of our country."

Thus, confronted with the validity of a fee substantially identical to that imposed upon Appellant under Section 207, the Supreme Court of California followed the more recent decisions of this Court and reversed its own earlier decisions which have followed *Baltic Mining Co.* v. *Massachusetts, supra.*

The Supreme Court of Utah, like that of California, has squarely held that the same principles are applicable to a single entrance or filing fee as are applicable to privilege fees imposed thereafter. In *Badger* v. *Crockett*, 70 Utah 265, 259 Pac. 921 (1927), J. C. Penny Company, a Delaware corporation, had "succeeded to all the property and business of a corporation by the same name organized and existing under and by virtue of the laws of the State of Utah," and had thereupon sought to procure a certificate of authority to carry on the local business theretofore carried on by its predecessor. (It will be observed that the J. C. Penny Company did exactly what

the Appellant did here in taking over the business of its subsidiaries in this State.)

Before a certificate of authority could be procured, the foreign corporation was required by the Utah statute to pay an entrance fee of 25c on each $1,000 par value of its authorized capital stock. In fairness, we should say that no maximum appears to have been prescribed, but for the reasons heretofore stated this fact is now wholly without importance. The required fee was paid under protest and suit instituted for its refund. In allowing recovery, and in holding the entrance fee unconstitutional, upon the authority of the Supreme Court decisions[25] above discussed, the Utah Supreme Court said:

> "The right of the state to exact the fee provided for in Section 2511, *supra, as a condition precedent to doing a local business in this state* is challenged as being violative of the commerce clause and the due process provision of the Federal Constitution. The concrete question here, therefore, is whether the state of Utah, under the conceded facts, may legally demand of respondent's assignor as a condition precedent to doing a local business in the state of Utah the tax or fee as specified in Section 2511, *supra.*"
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> * * * * *
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> "The exacting of this tax or fee in its practical operation must of necessity be a burden upon interstate commerce and a tax upon property beyond the jurisdiction of the state, all of which is prohibited by the federal constitution." (Italics supplied.)

[25] It will be recalled, however, that the Utah Court, like the California Court in the *Jordan Case*, was then without the benefit of the clarifying and controlling light shed upon this subject by the *Cudahy Packing Company Case*.

A few months after the decision of *Badger* v. *Crockett, supra,* the Supreme Court of Utah again passed upon the validity of an imposition upon foreign corporations measured by authorized capital stock. In *Minneapolis Steel and Machinery Co.* v. *Crockett,* 71 Utah 211, 263 Pac. 920 (1928), the tax in question was an annual license fee for the privilege of doing a local business, and following its earlier decision, the Utah Court held such fee unconstitutional. The amount of the annual fee appears to have been graduated in a manner similar to the Virginia statute, and with the unusually low maximum of $750.00 for all corporations having an authorized capital stock of over four million dollars. In an effort to avoid the effect of the recent decision in the *Badger Case,* it was argued that the principles there announced applied only to entrance fees and not to annual impositions. The Court promptly disposed of this argument as follows:

> "We can see no difference in principle between the requirements of the statute above quoted, Section 1271 (imposing the annual fee), and the provision of Section 2511 (imposing the entrance fee) involved in the *Badger Case. Both the fee or tax fixed by Section 2511 and the license fee fixed by Section 1271 are measured solely by the authorized capital stock, and neither is in any way related to the capital invested in business within the state or capital invested in the business of the corporation wherever located. The effect or result in either case must be the same, namely, to impose a tax upon a foreign corporation engaged in interstate commerce without regard to the amount of property invested within the state, and likewise to lay a tax upon property beyond the boundaries of the state.* It appears by the allegations of the complaint that

only a small percentage of the capital stock invested in the plaintiff corporation is used or invested in the state of Utah. Like facts appear in the allegations of the causes of action with reference to plaintiff's assignors. Tested by the standard of the opinions of the Supreme Court of the United States, and which opinions controlled our decision in the *Badger Case,* we can see no escape from the conclusion that the judgment in the *Badger Case* must be, and is, controlling of the question involved here.

"The Attorney General relies chiefly on the opinion of the Court in Baltic Min. Co. v. *Massachusetts,* 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127. *The opinion in that case gives support to the defendants' contention, but later decisions emanating from the same Court state that the rule or principle announced in Baltic Min. Co.* v. *Massachusetts must be considered as no longer the rule of law adhered to by that court."*

* * * * *

"The Attorney General, in an effort to differentiate Sections 2511 and 1271, argues that the fee fixed by Section 1271 is a license or excise fee, and is a tax or fee permissible for the state to collect so long as the amount of the fee is not unreasonable; and he further argues that the maximum annual fee of $750 for the privilege of continuing business in the state cannot be held to be unreasonable or arbitrary. The contention is not sound. *It is not the amount of the tax that is objectionable. It is rather the fact that the state by the statute in question imposes a tax or burden upon a foreign corporation which it permits to do business within the state without regard to the property of the corporation within the state or to the amount of money actually invested in the corporation both within and without the state.* In that regard it is a tax imposed upon interstate commerce, and upon property beyond

the jurisdiction of the state, neither of which is within the power of the state to do."

* * * * *

"The Supreme Court of California in *Perkins Mfg. Co.* v. *Jordan* (Cal.) 254 Pac. 551, recently decided, touching a question almost identical with the question here under review, says: 'There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon interstate commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the Supreme Court of the United States of the necessary effect and consequences of the state statute.'

"The foregoing statement of the California Court has, in our judgment, abundant support in the decision of the Supreme Court of the United States. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 38 S. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617; *Air-Way, etc. Corp.* v. *Day,* 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169; *Alpha Portland Cement Co.* v. *Massachusetts, supra; Frick* v. *Commonwealth of Pennsylvania,* 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316, and cases cited and discussed in these various opinions." (Italics supplied.)

Thus we have two careful opinions from the highest court in Utah flatly rejecting, in a most convincing fashion, the position taken by the court below that the constitutional principles which apply to entrance fees are different from those applicable to fees collected thereafter. Also, needless to say, these two decisions, as well

as that of the California court in the *Perkins Manufacturing Company Case,* squarely support Appellant's entire contention that the charge imposed under Section 207 is unconstitutional.

Chicago, Etc., Railroad Co. v. *Harman,* 89 Mont. 1, 295 Pac. 762 (1931),[26] is another recent State decision which holds an *"entrance fee"* measured by authorized capital stock invalid, and which also clearly indicates that the same constitutional principles are applicable to all so-called privilege fees imposed upon foreign corporations which are measured by property located beyond the State and used in interstate commerce.

The Supreme Court of South Carolina also has held unconstitutional a statute of that State which sought to impose an *entrance fee* upon foreign corporations measured by authorized capital stock. In *State* v. *Liggett & Myers Tobacco Co.,* 171 S. C. 511, 172 S. E. 857 (1933),[26(a)] the charge involved was an entrance fee sought to be collected from the Tobacco Company for the privilege of doing a local business. In describing the nature of the statute, the Court emphasized that it was essentially a charge upon entrance:

> "While the act refers to foreign corporations entering this State or already engaged in business in this State, *it is reasonable to say that the prime object of the Act was applicable to foreign corporations preparing to engage in business in this State.* Up to the time of engaging in business, such foreign corporation presumably had no property in the State nor was any part of its capital stock used in this

[26] It is to be noted that this Montana case is contrary to the earlier case by the same court of *State ex rel. General Electric Co.* v. *Alderson,* 49 Mont. 29. Such earlier case had followed the *Baltic Mining Company Case.*

[26(a)] Appeal dismissed, 291 U. S. 652.

> State, for the reason that it had not, up to then, engaged in any business in the State." (Italics supplied.)

The South Carolina court declared that the "earlier decisions of the Supreme Court of the United States were somewhat conflicting in their holdings," but held that *Cudahy Packing Co.* v. *Hinckle, supra,* was "very nearly in point," and that the validity of the South Carolina statute was controlled by that decision.

It appeared from the facts that the entrance fee which was held unconstitutional had been enacted in 1922, and that the Tobacco Company had been engaged in business in South Carolina prior to that time. However, it is entirely clear from the opinion that no weight whatsoever was attributed to the presence within the State of the foreign corporation at the time the entrance fee statute was enacted. This decision, like those above discussed, is predicated squarely upon the illegality of authorized capital stock as a measure for any charge imposed upon a foreign corporation for the privilege of doing a local business where such corporation has property in other States, or property used in interstate commerce.[27]

In concluding this discussion of the distinction sought to be drawn by the court below between a fee imposed at the time of entrance and one imposed thereafter, reference may be made to *Fletcher, Cyclopedia on Corporations,* Volume 18, where, in Section 8817, the eminent author summarizes the law as follows:

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[27] For two additional recent State decisions bearing upon this subject, and supporting Appellant's position generally, see: *Montgomery Ward Co.* v. *Becker,* 334 Mo. 789, (certiorari denied, 293 U. S. 559) and *State ex rel. Borden* v. *Dammann,* 198 Wisc. 265.

"The decisions as to the power to impress a tax of a given per cent of the entire authorized capital stock of a foreign corporation, as a condition of doing business in the state, are stated in another section of this subdivision, *and while, in many of the cases, the imposition was a charter fee for admission into the state, the governing law seems to be the same without regard to whether the imposition is an admission fee or a franchise tax collected annually after admission into the state.*" [28] (Italics supplied.)

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[28] To substantially the same effect, see *Colvert & Pyke, Taxation of Foreign Corporations,* 5 Cincinnati Law Review 54, 74-81; and comment in 43 Harvard Law Review 104.

III

The Imposition of This Fee Measured By Authorized Capital Stock Deprived Appellant of the Equal Protection of the Laws.

(1) Statement of Appellant's Position.

In the preceding sections of this brief we have argued the denial of due process resulting from taxing Appellant's property beyond the jurisdiction of Virginia, and the unlawful burdening of interstate commerce resulting from the taxing of Appellant's property used in such commerce.[29] The final assignment of error, namely, the denial of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution will now be argued. Appellant's position in this regard is that authorized capital stock is an inherently arbitrary and discriminatory measure for a privilege tax imposed on *foreign* corporations.

The contention that Section 207 offended the equal protection clause was not expressly discussed by the opinion below. However, in affirming the judgment of the State Corporation Commission, the Virginia court necessarily ruled upon this question adversely to Appellant.[30]

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[29] Such argument has been in support of Appellant's second and third specification of errors, *supra*.

[30] In criticizing the opinion by the Virginia Court in this case, the Virginia Law Review, after expressing the view that Section 207 was "an interference with interstate commerce" and "a denial of due process," further said: "It would seem that a holding that the statute (Section 207) denied equal protection of the laws to foreign corporations would have been justified." 22 Va. Law Review 958, at page 960.

(2) The Leading Case of Air-Way Electric Appliance Corp. v. Day.

In *Air-Way Electric Appliance Corp.* v. *Day*,[31] *supra*, this Court decided for the first time that the imposition of a privilege fee upon *foreign* corporations for the privilege of doing a local business is invalid as a denial of equal protection of the laws where such fee is measured by authorized capital. After first holding that the fees burdened interstate commerce, and in effect taxed property beyond the State, Mr. Justice Butler further held:

> "The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued or additional shares may be issued to acquire property or do business in other states or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. *The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the states where organized they chance to be authorized to issue the same number of non-par value shares, the annual franchise fees imposed on foreign corporations having the same amount of*

[31] This case was decided in 1924, six years after the decision in *General Railway Signal Co.* v. *Virginia, supra.* It must be remembered, also, that the question of the denial of equal protection of laws, like that of due process, was not involved in the *General Railway Signal Company Case.* In that case the only question raised or considered was whether interstate commerce was burdened.

property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another.

* * * * *

"It is clear that the *mere number of authorized non-par value* shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made." [32] (Italics supplied.)

In view of this Court's opinion in the *Air-Way Electric Appliance Corporation Case,* it is manifest that Appellant should be accorded the relief here sought if Appellant was entitled to be accorded equal protection by the laws of Virginia at the time the fee in question was imposed. The fee involved in the *Air-Way Corporation Case* was assessed after the corporation had been admitted to do a local business rather than at the time of entrance as in the case now before this Court. This difference in the time *when* the fee was imposed alone prevents *Air-Way Electric Appliance Corp.* v. *Day* from being a square precedent. Even so, Appellant submits for reasons which will now be developed that the rule of that case is applicable and controlling.

At the outset of this argument Appellant, of course,

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[32] A number of State courts have followed the *Air-Way Electric Appliance Corporation Case,* and held authorized capital stock to be an inherently invalid measurement for a privilege tax upon foreign corporations. For examples of such decisions, see *Perkins Mfg. Co.* v. *Jordan, supra; Montgomery Ward & Co.* v. *Becker, supra; Great Northern Rwy. Co.* v. *State,* 147 Wash. 630; and *State ex rel Borden Co.* v. *Dammann, supra.* Cf. *Roberts & Schaffer Co.* v. *Emmerson,* 271 U. S. 50.

recognizes that a State may legislate differently as between domestic corporations and foreign corporations prior to such time as the latter are admitted to the State. *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494 (1926). Appellant also recognizes, as being settled law, that foreign corporations are entitled to equal protection with domestic corporations once the former are admitted to the State. *Southern Railway Co.* v. *Greene*, 216 U. S. 400 (1910); *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U. S. 544 (1922). Moreover, *Air-Way Electric Appliance Corp.* v. *Day*, *supra*, holds that all foreign corporations admitted to do business in a State are entitled to equal protection.

The question thus left open by all of these decisions is whether foreign corporations must be accorded equal protection of the laws with respect to the conditions imposed upon them at the time of entrance.[33]

(3) The Doctrine of Unconstitutional Conditions Protects Foreign Corporations Seeking Entrance from Arbitrary and Discriminatory Conditions.

It is submitted that the answer to this question left open by the decisions of this Court is supplied by the doctrine of unconstitutional conditions, as that doctrine has been developed by judicial decisions. While the State may still exclude foreign corporations entirely, it is now well settled that once entrance is permitted the State may not impose as a condition thereto any unconstitutional requirement.[34] In *Williams* v. *Standard Oil*

[33] Apparently this Court has never heretofore passed upon this question.

[34] For numerous examples of the application of this doctrine, see the authorities cited *supra* under Section II (2) of this brief.

Co. of Louisiana, 278 U. S. 235 (1929), the modern rule is succinctly stated:

> "Nor need we stop to consider the further contention that appellees, being foreign corporations, may not carry on their business within the state except by complying with the conditions prescribed by the state. While that is the general rule, a well settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution."

A discriminatory admission fee, imposed as a condition upon the entering to do a local business, comes within the logical scope of the doctrine of unconstitutional conditions. When an admission fee is imposed the State has elected not to exclude the foreign corporation. The moment this election is made, "conditions which require the relinquishment of rights guaranteed by the Federal Constitution" cannot be imposed. One of the rights so guaranteed is equal protection of the laws, and this right is clearly infringed if a discriminatory charge is exacted at the time of entering to do a local business.

The fact that the foreign corporation may avoid the unconstitutional condition by staying out of the State has been held repeatedly not to render such condition constitutional, See *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490 (1927).

Counsel for Appellee contend that even if the doctrine of unconstitutional conditions prevents a State from exacting an entrance fee which reaches property in other jurisdictions, or which burdens property used in interstate commerce, such doctrine can have no application to the equal protection clause. This argument is based on the language of the Fourteenth Amendment, which

in terms requires a State to accord equal protection to persons "within its jurisdiction."[35] Appellee asserts, therefore, that no corporation seeking the privilege of admittance to do a local business is within the State's jurisdiction, and that accordingly the entrance fees and conditions may be as discriminatory, between foreign corporations seeking admission, as the State may desire to make them.

This argument has the dubious virtue of surface plausibility. It is similar in principle, as well as plausibility, to the now repudiated argument that since a State has the power to exclude foreign corporations, it may impose any condition desired as the price of admission.

The fallacy of Appellee's argument is perhaps nowhere more concisely exposed than in this Court's opinion in *Frost Trucking Co.* v. *Railroad Commission, supra,* where it was said:

> " 'For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. *If this were otherwise, the state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state, and, as we have pointed out, the state might thus deprive every corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution.* * * *' " (Italics supplied.)

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[35] No such limitation exists with respect to the denial of due process, and the burdening of interstate commerce.

A corporation must be regarded as being within the jurisdiction of the State once the right to exclude entirely is waived. Virginia has adopted a general law applicable to all foreign corporations desiring to do business here; by so doing and until such law is repealed, all corporations may come into the State by paying the entrance fee and conforming to certain other formal requirements. *The fee is paid under Virginia law. Can the State by its laws exact a fee and at the same time say that the corporation paying such fee is not within its jurisdiction so far as that fee is concerned?*

Furthermore, if Appellee is correct in contending that a State may deal as arbitrarily and discriminatorily as it may desire with foreign corporations seeking identically the same privilege, namely, the right to enter to do a local business, a way has been discovered to thwart and dissipate much of the protection now afforded foreign corporations by the doctrine of unconstitutional conditions.

If Appellee's position is sustained, a State may with complete legal impunity impose grossly discriminatory fees at the time of entrance and avoid constitutional difficulties unless other provisions of the Constitution are violated. That is, an entrance fee may be grossly discriminatory, and yet at the same time it may not be measured by property used in interstate commerce, or located beyond the taxing jurisdiction of the State.[35(a)] For example, the amount of the fee charged at the time of entrance might arbitrarily be fixed at $100,000 for oil company A, at $50,000 for oil company B, at $5,000 for oil company C and so on. In order to avoid discouraging oil company B too greatly by such a

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[35(a)] In the instant case, Section 207 is not only grossly discriminatory, but also it violates two additional constitutional mandates.

large entrance fee, the State may further provide that such fee, although charged at the time of and as a condition upon entrance may be payable in small annual installments. While the foregoing example may seem remotely possible, we believe it illustrates the unsoundness of a distinction based solely upon *when* the fee for the privilege of doing business is charged. If charged after entrance and measured by authorized capital stock, it is discriminatory and invalid;[36] if charged at the time of entrance and measured by authorized capital stock it is admittedly no less discriminatory. How can it be less invalid?

Recognizing the dangers indicated above, a leading writer on the subject of unconstitutional conditions pointed out, as early as 1918, that such doctrine would be extended to afford corporations seeking admission the equal protection of the laws. Henderson, in his volume "The Position of Foreign Corporations in American Constitutional Law," at page 161, makes this prophecy in connection with the case of *Southern Railway Co.* v. *Greene, supra.* In speaking of certain language used in that case which indicated that permanent investment within the State was necessary before a foreign corporation was entitled to equal protection, he said:

> "If this view prevails, the doctrine of the State's power to exclude foreign corporations has still much vitality left. *It will protect corporations which have unlimited licenses against additional exactions, but it will not prevent states from carrying out a policy of aggressive discrimination against corporations seeking admission. As to them, the state can not only impose discriminating conditions at the outset, but it can grant them licenses running for a year,*

[36] *Air-Way Electric Appliance Corp.* v. *Day, supra.*

and require an annual renewal. Each renewal can then be made conditional on whatever further exactions the state wishes to make. And if from year to year, why not for a shorter period, or even at will? The effect of the *Greene Case* would then be similar to that of the famous *Dartmouth College Case,* and could be as easily avoided by a general reservation of the right to amend. This points, it seems to me, to the fallacy underlying any such restriction of the doctrine of the *Greene Case,* for a license terminable at will is precisely what the traditional doctrine has always called the corporation's tenure. If a corporation can give an effective consent to the state's express statutory reservation of the right to alter the conditions on which it may remain, why could it not as effectively consent to what the Supreme Court had always said was the state's right without such reservation? *To limit the doctrine of the Greene Case to corporations already lawfully in the state by official license is to conclusively refute the reasoning on which that case rests.*

"Is it not just here that the doctrine of unconstitutional conditions applies? That doctrine, in its later form, is that a state cannot, in the guise of a conditional license to do business in the state, exact of a foreign corporation anything which it could not exact by direct imposition. It cannot admit a corporation on condition that it will allow itself to be deprived of property without due process, or to be denied the equal protection of the laws."

* * * * *

"It seems most likely, therefore, that the doctrine of unconstitutional conditions will in the future be absorbed in the larger principle that a foreign corporation is protected against arbitrary expulsion or discrimination by the Fourteenth Amendment, and that its only influence will be to insure that that doctrine is applied not only to corporations already

> in the state when the objectionable law was passed, but to all that may subsequently enter." (Italics supplied.)

The language in the *Greene Case* indicating the necessity of investment within the State has, as Henderson prophesied, been disregarded. The equal protection clause was applied where the corporation entered the State solely for the purpose of bringing suit, *Kentucky* v. *Paramount Exchange, supra,* and where the only property in the State was good will. *Hanover Fire Insurance Co.* v. *Harding, supra.* See also 42 *Harvard Law Review,* 676, 678.

A recent article appearing in 5 *Cincinnati Law Review* 54, entitled "Taxation of Foreign Corporations," written by Messrs. Ralph A. Colvert and John S. Pyke, discussed in considerable detail the question of the applicability of the equal protection clause to fees imposed at the time of entrance. Since there appear to be no controlling judicial precedents on this problem, we take the liberty of quoting from this article (pp. 75-81):

> "The answer to this problem may in some measure be determined by an examination of the attitude of the Supreme Court toward 'unconstitutional conditions' imposed by a state on the admission of foreign corporations.
>
> "Although early in the history of corporate law, such unconstitutional conditions were within the power of the states, in the last twenty years the Supreme Court has refused sanction of burdens on the foreign corporation repugnant to the Federal Constitution. No longer, for instance, can a state require a foreign corporation, before it may do business in the state, to consent to waive all rights

to appeal cases to Federal courts, nor are states allowed to impose regulations which would burden interstate commerce.

"Although we have no settled law on the question, the doctrine naturally extends itself to a refusal to allow states to deny foreign corporations equal protection of the laws. The problem has two phases: first, discrimination between a domestic and a foreign corporation; and second, discrimination between two different foreign corporations.

"It readily appears that a state may levy an admission fee which would subject foreign corporations to a burden from which domestic corporations would be free, for otherwise we would be forced to abandon entirely the use of admission fees. (Citing *Hanover Fire Ins. Co.* v. *Harding.*)

* * * * *

"Although this first phase of the 'equal protection' problem is clear, the second question of the constitutionality of admission fees which discriminate between two foreign corporations is more puzzling. The Supreme Court, which no clear pronouncements on the issue, is indecisive; the trend of judicial interpretation, however, points in only one direction." (Italics supplied.)

After citing *Henderson, op. cit. supra,* the Restatement of the Law of Conflict of Laws, and after referring to several persuasive judicial decisions, these writers in the Cincinnati Law Review conclude that "an admission fee based on authorized capital stock would be declared unconstitutional" as a denial of equal protection of the laws. In so concluding, they added:

"We have observed that, although as a condition to doing business a state may discriminate between

domestic and foreign corporations, it may not demand foreign corporations to waive the right of appeal to Federal courts, or to submit to burdensome regulation of interstate commerce, or to forego protection of the laws equal to that accorded to other foreign corporations. *Despite the fact that the Supreme Court has not yet squarely ruled on this question, it seems that in the light of recent authorities and the attitude of the Supreme Court in curbing the arbitrary power of a state to exclude foreign corporations, the same principles will control in both annual and admission fees. Consequently, it would seem that an admission fee based on the proportion of authorized capital stock represented in the state, would be declared unconstitutional as a denial of equal protection of the laws.*" (Italics supplied.)

Apparently, the only judicial decision wherein this particular question has been squarely passed upon is the California case of *Perkins Manufacturing Co.* v. *Jordan, supra.* As heretofore pointed out, the facts in that case were substantially identical to those presently involved, particularly since the corporation involved was seeking to enter the State for the first time. Although relying upon other grounds of unconstitutionality, the California court also held that the fee in question violated the equal protection clause of the Constitution. In so holding, the court squarely met the argument that a fee charged upon admission is entitled to different treatment from a fee collected thereafter. The court said:

"There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon inter-

state commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the supreme court of the United States of the necessary effect and consequences of the state statute." (Italics supplied.)

Finally, it is of profound importance that the view for which Appellant here contends has been unequivocally adopted by the American Law Institute in its Restatement of the Law of Conflict of Laws.[37]

"A state of the United States cannot compel a foreign corporation, as a condition of doing or continuing to do business in the state, to relinquish rights secured by the Constitution of the United States (Sec. 170).

* * * * *

"Under the Constitution of the United States, a state cannot make a condition of a foreign corporation's doing business in the state the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the state" (Sec. 176).

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[37] Adopted and promulgated as the final draft on May 11, 1934.

IV

Virginia Stands Almost Alone in Use of Authorized Capital Stock as Measure.

(1) The Opinion Below.

Counsel for Appellee took the position, before the court below, that total authorized capital stock was "the only practical way"[38] by which a fee of this character could be measured. Apparently impressed with such an argument, the Virginia court commented as follows:

> "Indeed, if this entrance fee had not been paid at the time of entry it might never be paid. Insolvency might intervene. The petitioner might complete its work and withdraw before an assessment or levy could be made."[39]

As may readily be demonstrated, the great majority of the other States have found "practical" and satisfactory modes of measuring fees imposed upon foreign corporations for the privilege of doing a local business without resorting to authorized capital stock.

(2) Only Five Other States Employ Authorized Capital Stock as a Measure.

In 1910 when Section 207 of the Virginia Tax Code was enacted, *Western Union Telegraph Co.* v. *Kansas, supra,* had just been decided but not yet officially reported, and the measuring of charges upon both foreign

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[38] See brief on behalf of Commonwealth of Virginia, at page 45.
[39] *Atlantic Refining Co.* v. *Commonwealth, supra,* at page 493.

and domestic corporations by total authorized capital stock was then much in vogue. For twenty-five years since that date, the courts, with the exception of the confusion occasioned by the Baltic Company decision, have unanimously held invalid State statutes employing such mode of measurement. *Today only five States, other than Virginia, measure entrance fees by total authorized capital stock without apportioning such fee to local business or property.*[40]

With respect to annual fees, measured by authorized capital stock, Colorado, Idaho and Virginia now seem to be the only States which continue to so measure such charges upon *foreign* corporations, without apportioning the amounts thereof to local business or property.

We are unable to say how many State legislatures have followed the repeated warnings of the Supreme Court and *voluntarily* abandoned the use of authorized capital stock. From the cases discussed *supra*, it has been seen that the courts have compelled at least thirteen States *involuntarily* to adopt a mode of measurement as to foreign corporations which bears some relation to the privilege conferred, and which does not in effect tax property and commerce protected by the Constitution. This Court has rendered invalid the statutes of Arkansas, Kansas, Texas, Massachusetts, Ohio and Washington. And State supreme tribunals have held unconstitutional such

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[40] These States are Idaho (Sections 65-809, Idaho Code 1932), Mississippi (Sections 4137 and 4138, Code of 1930), Nebraska (Sections 24-222, Compiled Statutes, 1929), New Mexico (Sections 32-223, Compiled Laws, 1929), and North Carolina (Section 1181, as amended by Laws of 1935, c. 44). And the Nebraska statute above mentioned merely affords an *optional method* rarely followed. (Three other states use authorized capital as a measure, but apportion the charge to local business and/or property.)

statutes in California, Illinois, Missouri, Montana, South Carolina, Utah and Wisconsin.

It is manifest, therefore, that the fears of the court below are groundless, and that Virginia now finds itself among the last of the States to cling to the measurement of total authorized capital stock, without apportionment to local business or property.

Of course, Appellant is under no duty to point out to the Virginia Legislature a "practical" as well as a constitutional mode of measuring its fees. However, for the convenience of this Court, an examination has been made of the methods employed by several of the leading industrial States with respect to the imposition of entrance fees upon foreign corporations. The results of such examination are appended hereto as "Appendix A."

V

Summary and Conclusion

The statute here assailed, Section 207 of the Tax Code, was admittedly on the "border line" in 1918 because of its inevitable effect upon the interstate commerce of a foreign corporation having much of its property engaged in that commerce. However, its validity was then sustained in *General Railway Signal Co.* v. *Virginia, supra,* principally upon the authority of the *Baltic Mining Company Case.* Since 1918, subsequent decisions of this Court have "expressly disapproved" the *Baltic Mining Company Case* doctrine, and have also rendered ineffacious the two "characteristics" then said to save the validity of Section 207.[41]

In any event, the *General Railway Signal Company Case* did not involve or pass upon whether Section 207 violated the Fourteenth Amendment. Whether it deprived a foreign corporation of its property without due process or denied such a corporation the equal protection of the laws, were not passed upon in the *Signal Company Case.* However, these questions have been authoritatively determined by this Court in other decisions entirely applicable.

It has now become a settled principle of our jurisprudence that a fee measured by "the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and

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[41] *Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Cudahy Packing Co.* v. *Hinkle, supra.*

for every practical purposes a tax * * * on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located." [42]

Manifestly, under this settled principle, Appellant has been deprived of its property without due process by the exaction of this fee measured by its property in forty-six other States and several foreign countries. This is true regardless of whether the fee exacted unlawfully burdened interstate commerce,[43] as Appellant also contends.

Moreover, the decision in *Air-Way Electric Appliance Corp. v. Day, supra,* when taken in conjunction with the doctrine of unconstitutional conditions, requires that Section 207 be held invalid as denying to Appellant the equal protection of the laws. As such decision holds, "the mere number of authorized shares * * * is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount" of privilege fees.

Finally, Appellant submits that the numerous decisions by State appellate courts herein discussed, and which uniformly sustain the view that Section 207 is invalid as applied to Appellant, are entitled to be given persuasive weight by this Court. The opinion below cannot be sustained if these State court decisions have been correctly decided.

Accordingly, Appellant respectfully prays that the opinion below be reversed, and that a final judgment may be ordered directing a refund of said $5,000, with inter-

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[42] *International Paper Co.* v. *Massachusetts, supra,* at page 142; *Cudahy Packing Co.* v. *Hinkle, supra,* and numerous other authorities hereinbefore cited.

[43] *Frick* v. *Pennsylvania,* 268 U. S. 473.

est thereon at six percentum per annum from the 19th day of January, 1930, and with its proper costs expended in this proceeding.

Respectfully submitted,

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APPENDIX "A"

Examples of Methods Employed by Other States in Imposing Entrance Fees.

Without undertaking to discuss their constitutionality or to suggest that they are the most desirable methods, the following statutes from other jurisdictions afford interesting examples of ways to avoid the use of total authorized capital stock.

1. The New York statute involved in the case of *People* v. *Loughman*, 249 N. Y. 369,[44] suggests a simple method, which on its face appears to be entirely practical. There the statute, which was construed as imposing a pure entrance fee, read as follows:

> "Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state; to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if *in* any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then

[44] It will be remembered that the Virginia Court below relied on the *Loughman Case*. It is patent from the N. Y. statute above set forth, and from the opinion itself that such case in no way supports the validity of Section 207 of the Virginia Tax Code.

a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bears to the gross assets wherever employed in business. *On* the issued capital stock of any corporation issuing shares without designated monetary value *such corporation* shall pay for the use of the state a license fee of six cents on each such share employed in this state, as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations, and the state tax commission shall have the same power to issue a warrant for the collection of such license fees, as now exists with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state."—Cahill's Consolidated Laws of New York, Annotated Supplement (1927), Chapter 61, Section 181.

In considering the nature and effect of the foregoing statute in the *Loughman Case,* the New York Court of Appeals said:

"The relator is a foreign corporation. The Legislature might have excluded it from the State.

* * * * *

"The State has admitted the relator subject to the condition that the corporation pay a license fee, just as a domestic corporation must pay an organization tax before it has any power to act. The measure of the tax adopted by the Legislature required postponement of the tax bill a year after the corporation began to do business. Only in that sense is such payment a condition subsequent. *The obligation to pay arose when the corporation began to do business in the State, and the effect of failure to meet that obligation results not merely in the revocation of authority previously granted by the State to do business here, but acts as a bar to enforcement, within the State, of contracts made in the course of such business. Essentially the tax constitutes the payment exacted for the privilege of entering into the State, even though in some particulars it is analogous to a franchise tax.*" (249 N. Y. 369.) (Italics supplied.)

It will be noted that the New York statute imposes a charge which becomes a binding obligation on the foreign corporation at the time it *enters*, but the determination of the amount of such charge is simply postponed until the end of the first year's business. At such time the corporation is able to report accurately to the Tax Commissioner the "gross assets employed in any business within" the State of New York, and in light of such information the amount of the entrance fee may be determined as prescribed by the statute. It is readily apparent that the New York method seeks to relate the amount of the charge to the value of the license or privilege conferred by the State. It will perhaps be interesting to apply concretely

the foregoing statute to a foreign corporation which has a total issued capital stock of $10,000,000, with gross assets everywhere of $25,000,000, and with gross assets in New York during the first year's business there of $2,500,000. Applying the formula of the New York statute to this situation, the entrance fee would be computed as follows:

$\frac{\$\ 2,500,000}{\$25,000,000} \times \$10,000,000 = \$1,000,000$ (Amount of capital stock employed within State)

$.00125\% \times \$1,000,000 = \$1,250$ (The amount of the entrance fee)

2. A second method is that now used in Illinois (which State formerly used total authorized capital stock as a measure) where an initial "license fee" is charged foreign corporations at the time of entrance into the State, as prescribed by the following statutes:

"Sec. 135. License fees payable by foreign corporations. The Secretary of State shall charge and collect from each foreign corporation authorized to transact business in this State the following license fees, computed on the basis and at the rates prescribed in this Act:

"(a) An initial license fee at the time of filing its application for a certificate of authority to transact business in this State.

"(b) An additional license fee at the time of filing (1) a report of the issuance of additional shares, or (2) a report of an increase in stated capital or paid-in surplus, or both, without the issuance of shares, or (3) a report of an exchange or reclassification of shares, whenever any such report discloses an increase in the sum of its stated capital and paid-in surplus

over the sum thereof last reported in any document, other than an annual report, required by this Act to be filed in the office of the Secretary of State.

"Sec. 136. *Basis of computation of license fees payable by foreign corporations. The basis for the initial license fee payable by a foreign corporation shall be the amount represented in this State, determined in accordance with the provisions of this section, of the sum of its stated capital and paid-in surplus.*

* * * * *

"For the purpose of determining the amount represented in this State of the sum of the stated capital and paid-in surplus of a foreign corporation. the amount represented in this State shall be that proportion of the sum of its stated capital and paid-in surplus which the sum of (1) the value of its property located in this State and (2) the gross amount of business transacted by it at or from places of business in this State bears to the sum of (1) the value of all of its property, wherever located, and (2) the gross amount of its business, wherever transacted.

"The proportion represented in this State of the sum of the stated capital and paid-in surplus of a foreign corporation shall be determined from information contained in the latest annual report filed by the corporation, or, if no annual report has been filed, from information contained in the application of the corporation for a certificate of authority to transact business in this State, or, in case of a merger, from information contained in the report of the surviving corporation of the amount of its stated capital and paid-in surplus following the merger.". (Illinois Acts 1933, p. 376, 377). (Italics supplied.)

In addition to the foregoing initial entrance fee, an annual franchise tax is also imposed upon foreign corporations and computed in substantially the same fashion as is the initial fee.

3. Following the mandate of the Supreme Court in the decision of *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, the State of Washington abandoned its filing or entrance fee measured by total authorized capital stock and enacted the following statute:

> "All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in the State of Washington shall pay for the privilege of so doing the same fees as are prescribed in section one (1) hereof for the filing of articles of incorporation of a domestic corporation, such fees to be computed upon the portion of capital stock of such corporation represented or to be represented in the State of Washington, to be ascertained by comparing the value in money of its entire property and capital with the value in money of its property and capital in, or to be brought into, and used in this State * * *" (L. 1929, Ch. 227, Sec. 2).

It thus appears that Illinois and Washington undertake to collect initial entrance fees at the time the corporation enters rather than at the end of the first year as does New York. Such fees are measured by the property to be used within Illinois and Washington, the corporation seeking admission apparently being required to submit, in its application, an estimate of such property. No study has been made to ascertain the precise manner in which the Illinois and Washington methods operate in practice, but it is apparent that a corporation seeking to enter will ordinarily be able to furnish reliable information as to its

anticipated activity in the State for the first year. Consider, for example, the case presently involved where Appellant was simply taking over the business and property in Virginia of its subsidiaries.

4. A fourth method, having the virtue of simplicity and believed to be used in many States, is that employed by Maryland. Article 23, Section 119, of the Annotated Code of Maryland (1924), provides that:

> "At the time of original qualification and filing of the original papers required by this section, every such foreign corporation shall pay to the State Tax Commission, for the use of the State, a fee of twenty-five dollars, upon receipt of which the Secretary of the State Tax Commission shall issue to it a certificate setting forth that it is entitled to do business in this State * * *."

The foregoing flat fee of $25.00 appears to be the only fee required of foreign corporations by Maryland at the time of entrance, and that thereafter such corporations are required to pay "an annual franchise tax" as prescribed by the following statute:

> *"Every foreign corporation,* except insurance companies of all classes, and corporations subject to a franchise tax measured by gross receipts, which maintains an office or place of business and exercises its franchises in this State, shall pay to the State Treasurer, *for the use of the State, an annual franchise tax upon the amount of capital employed by it in this State on the preceding first day of January,* as determined by the State Tax Commission at the following rates, that is to say: The sum of twenty-five dollars for every fifty thousand dollars, or frac-

tional part thereof of capital employed by it in this State up to five hundred thousand dollars—but in no case less than twenty-five dollars; if the amount of such capital is more than five hundred thousand dollars, and not more than five million dollars, then an additional amount equal to one-fortieth of one per cent on the excess; and if more than five million dollars, then an additional amount at the rate of thirty dollars for every million dollars of such last named excess. The State Tax Commission after ascertaining the amount of capital employed in this State by each foreign corporation shall certify the same, together with the amount of franchise tax due thereon by the corporation, to the Comptroller of the Treasury, who shall at once proceed to collect said tax, which shall be collectible by him and payable to the Treasurer of Maryland in the same manner as is now or may hereafter be prescribed by law for the collection and payment of taxes to the Comptroller of the Treasury by other corporations. If the franchise tax imposed on any foreign corporation shall not be paid by the first day of November in the year for which such tax is imposed, if on that date thirty days shall have elapsed since the rendition of a bill for such tax by the Comptroller of the Treasury and, if not, then at the expiration of said thirty days' period, any and all defaulting foreign corporations shall forfeit the right to do business in this State until all taxes due are paid, as well as any interest or charge thereon and in addition be subject to the penalty prescribed by Section 121 of this Article." (Article 23, Section 122.)

Statutes from other States would present some variations of the methods employed by New York, Illinois, Washington and Maryland, but the foregoing are sufficient to indicate typical methods used by other States, and to point out the fundamental principle underlying the

manner in which other States avoid the use of *total* authorized capital stock as a measure. *This principle is that the charge imposed should be related to the license or privilege conferred and hence, unless a nominal initial fee is charged as in Maryland, its amount must be determined and measured by property and/or business within the State.*

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 1

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA, *Appellee.*

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

Supplemental Reply Brief for Appellant.

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Supplemental Reply Brief for Appellant.

Explanatory Statement

This case, involving the validity of the fee imposed by the State of Virginia upon foreign corporations for the privilege of entering to do a local business, was No. 40 on the Docket of this Court at its October Term, 1936.

It was argued orally and submitted on October 21st and October 22, 1936. No decision having been handed down, an order was entered on June 1, 1937, restoring this case to the docket, and directing a reargument.

A careful check of the authorities has disclosed no case decided since the submission of this cause in October 1936 which, in the opinion of Appellant, bears directly upon the questions presented by this appeal.[1] Moreover, a re-examination of the entire record in this case, as well as the applicable authorities, has satisfied Appellant that its position has been fully stated and argued in its Jurisdictional Statement, in its Brief in Reply to Appellee's Statement Opposing Jurisdiction, and in its main Brief, previously filed herein. Accordingly, Appellant believes that no proper or useful purpose could be served by filing an additional brief containing, as would necessarily be the case, a reiteration of matters already deemed to have been fully covered.

However, Appellant is advised by counsel for the State of Virginia that such counsel intend to argue that the recent case of *Great Atlantic & Pacific Tea Company* v. *Grosjean,* 81 L. Ed. (Adv. Sh.) 735 (decided May 17, 1937) lends support to the validity of the Virginia statute here in question. In view of such announced intention, Appellant considers it proper to submit this Supplemental Reply Brief in what might be deemed anticipatory rebuttal of Appellee's new argument. The discussion which follows will be limited to an analysis of the *Grosjean Case,* and to the pointing out of the features which clearly distinguish it from the instant case.

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[1]The one exception is the case of *Southern Natural Gas Corp.* v. *Alabama,* 81 L. Ed. (Adv. Sh.) 695, decided April 26, 1937, which is mentioned *infra,* in connection with Appellee's contention considered in this Supplemental Brief.

The Case of *Great Atlantic & Pacific Tea Co.* v. *Grosjean*

The *Grosjean Case* involved the validity of the Louisiana Chain Store Tax,[2] which was described as "an occupation or license tax" levied upon the business of conducting chain stores within the State of Louisiana. Section 2 of the Louisiana law stated that the tax was imposed "because of the advantages accruing from the operation of multiple stores wherever situated and because of the basic difference inherent in the character of operations." Section 3 thereof provided that the tax "shall be based on the number of stores or mercantile establishments included under the same general management * * * whether operated in this State or not, and shall be fixed and graded as follows, to-wit: (1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten Dollars ($10.) for each such store operated in this State." There were fifteen additional paragraphs progressively increasing the rate per store in Louisiana of larger chains.

The Great Atlantic & Pacific Tea Company, having 15,082 stores in the United States and elsewhere, came within the rate prescribed for "chains of more than five hundred," and accordingly was required to pay a tax of $550. on each of its 106 stores situated in Louisiana. As this Court pointed out, "the measure of the exaction" was the number of units of the chain within the State, while the rate of tax for each such unit was fixed by reference to the size of the entire chain.

In disposing of the contention that the Louisiana Act contravened the equal protection clause of the Fourteenth

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[2]Act 51, La. Leg. 1934.

Amendment, the Court pointed out that the reasons announced by the Legislature in Section 2 of the Act for the imposition of the tax were fully sustained by the established facts:

> "The District Court found that the testimony offered by the State was similar to that in *State Tax Comrs.* v. *Jackson,* 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536, *supra;* established the difference in type of operation between the operator of one store and the operator of many, and the variance in advantage and mode of operation with the number of units in the chain. In addition, the court found that all the stores of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores, and increase the per unit multiple advantage enjoyed by the operator of the system; that the greater the number of units the greater the purchasing power of the chain, the greater the rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead. 'In fine, the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the *Jackson Case.*' These findings are assigned as error, but they have substantial support in the record and we therefore accept them.
>
> "If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at the state boundary. * * * " (p. 737)

In the light of the foregoing findings it was held:

"* * * Thus it appears that the classification is not based upon the location of the stores within or without the state but upon the type of business conducted, the scale of that business, its accompanying competitive advantages and economic results.

* * * * * *

"The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection" (p. 739).

The second major contention was that the Act deprived the companies involved of property without due process "because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana." This contention was disposed of on two grounds. It was first pointed out that the subject of the tax—the conduct of a chain store business in Louisiana—was a legitimate subject of a license or occupational tax, and that the measure of the exaction was "the number of units of the chain *within the State*," a measure said to be sanctioned by the decisions of this Court. Only the rate of the tax for each such unit was fixed by reference to the size of the entire chain, and this was held insufficient to constitute a taxing of property beyond the borders of Louisiana.

In the second place, and as the fundamental basis of the decision, it was held that the State's *police power* fully justified the reference to the size of the entire chain in fixing the rate per unit within the State. The Court's exposition of this view conclusively demonstrates the inapplicability of the Grosjean decision to the instant case, and therefore merits full quotation:

"Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much

broader considerations touching the state's internal policy of police sustain the exaction. The tax is laid solely upon intrastate commerce. In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit.

* * * * * *

"Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.

"If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation. * * *" (pp. 740-41.)

The *Grosjean Case* Lends No Support to the Validity of the Tax Here in Question

Counsel for the State of Virginia have indicated that they will argue that the *Grosjean Case* supports the validity of the Virginia tax imposed on foreign corporations for the privilege of entering to do a local business. This argument seems to be as follows: The rate of the Louisiana Chain Store Tax is determined by the "size of the entire chain", including stores located in foreign states; this was held not to constitute a taxing of property beyond the jurisdiction of Louisiana; therefore, Section 207 of the Virginia Tax Code, imposing a tax upon

foreign corporations, both the rate and measure of which are determined by total authorized capital representing the corporation's business and property wherever located, does not effect a taxing of property beyond the jurisdiction of Virginia.

Although such argument is believed to be manifestly unsound on its face, we shall now specifically designate and discuss the distinguishing features of the two exactions, and show that the validity of the Virginia tax is not in any way supported by this Court's decision in the *Grosjean Case.*

First. If conceptions of subject, measure and the rate of a tax are considered, as they were in the case under discussion, an important distinction is immediately found to exist. The Louisiana tax, as this Court pointed out, was measured by "the number of units of the chain within the state—a measure sanctioned by our decisions." Only the rate of the tax for each such unit was fixed by reference to the entire chain. The Virginia tax, however, is measured solely and entirely by the foreign corporation's total authorized capital, which "represents all of its business of every class and all of its property wherever located."[3] Likewise, its rate is determined solely by total authorized capital stock.

In other words, the Louisiana tax is related directly to and is measured by the stores located within the State, while *the Virginia exaction in question has no relation whatever to any local subject or activity.* This characteristic of the Virginia tax, which in itself distinguishes it from the chain store tax, has been held repeatedly to establish the invalidity of like statutes.[4]

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[3]*International Paper Co.* v. *Mass.*, 246 U. S. 135, 142.

[4]See cases cited in Appellant's Brief, heretofore filed.

Second. A conclusive distinction lies in the nature and purpose of the two exactions. The Louisiana tax was sustained as a valid exercise of the State's police power, while the Virginia tax here in question has no relation whatever to police power, being imposed upon all foreign corporations as a charge for the privilege of entering the State to engage in intrastate business therein. That this distinction is controlling becomes apparent from an examination of the Court's reasoning in the *Grosjean Case.* Mr. Justice Roberts, after pointing out that the "measure" of the tax was confined to units within the State, proceeded on to the "much broader considerations touching the State's internal policy of police," which were expressly found to "sustain the exaction." There were findings that the business practices (such as rebates and allowances) and the superior economic advantages (such as national advertising and large scale purchasing) of chain stores constituted "local evils", and that such "local evils" resulted from and varied directly with the size of the chain. The Court further found that the public policy of Louisiana to correct these evils within the State would be frustrated and "set at naught" if the size and magnitude of the chain everywhere could not be considered by the Legislature. In this connection, the Court said:

> "* * * The appellants, by incorporating in some other state, or by spreading their business and activities over other states, cannot set at naught the public policy of Louisiana. The claim is, essentially, that even if local evils flow from the appellant's methods the state cannot control those evils because its power is limited to conditions created by the members of the chain found within the state. The conclusion is that the state must treat these stores as

> if they were something different from what they really are, since to do otherwise would be to reach beyond the borders of Louisiana for the measure of the tax. The argument answers itself. The policy Louisiana is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana or are in part the result of extra-state transactions. It is not a denial of due process to adjust such license taxes as are here involved to meet the local evil resulting from business practices and superior economic power even though those advantages and that power are largely due to the fact that the taxpayer does business not only in Louisiana but in other states" (p. 741).

It is thus evident that the Louisiana Chain Store Tax was sustained as a police measure, designed to mitigate specified evils and to neutralize disadvantages of the small local merchants. Manifestly, therefore, the sustaining of such a measure affords no precedent for upholding the Virginia tax imposed upon the authorized capital stock of all foreign corporations for the privilege or right of doing a local business within the State. No "local evil" or other basis for the exercise of police power exists in this case; and in fact the State of Virginia has never attempted to sustain or justify this exaction as an exercise of its police power. The sole basis here relied upon is the long recognized power of a State to exclude foreign corporations from doing a local business, and to impose charges and conditions as the price of granting the privilege to engage in such a business.

Third. It is patent that this Court did not consider the Louisiana Chain Store Tax to be analogous to privi-

lege taxes imposed on foreign corporations for the privilege of doing a local business. As the briefs heretofore filed amply demonstrate, there are numerous decisions by the Supreme Court involving the validity of such taxes on foreign corporations, and which expressly discuss the extra-territorial effect of measuring a tax by authorized capital. *Yet none of such decisions is cited or mentioned in the Grosjean opinion.* Stemming back to *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and culminating in *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, there is a long line of decisions by this Court holding invalid privilege taxes imposed on foreign corporations where measured by authorized capital stock. It cannot be supposed that the soundness of all of these cases was questioned by the Chain Store Tax case, without even so much as a reference to one of them. Yet this is the necessary consequence of Appellee's argument that the *Grosjean Case* is authority for the validity of a privilege tax on foreign corporations measured by total authorized capital, representing the business of such corporations, both interstate and intrastate, and their property wherever located.

The truth is that the decisions on the power of a State to impose privilege taxes on foreign corporations constitute a separate and very important body of our constitutional jurisprudence, involving in essence a State power different and distinct from the police power. The decision in the *Grosjean Case* was not intended to, and did not in fact, invade the domain of privilege taxes on foreign corporations, and there upset long established doctrines of constitutional law.

Fourth. The case of *Southern Natural Gas Corp.* v. *Alabama,* 81 L. Ed. (Adv. Sh.) 695, decided on April

26, 1937, only three weeks before the Grosjean decision, is further evidence that the Louisiana case involved different principles from those applicable to privilege taxes on foreign corporations, and is no authority for the validity of such a privilege tax measured by total authorized capital. In the *Southern Natural Gas Corporation Case* the privilege tax imposed by Alabama "upon foreign corporations as a prerogative to the right of exercise of corporate functions in the State" was sustained. The measure of such tax, however, was "the actual amount of capital employed" in Alabama, and this Court by its unanimous opinion was careful to point out:

> "As Alabama was competent to lay a franchise tax upon appellant for the privilege of doing an intrastate business, it was competent to measure the tax by the capital employed within the State provided the tax was not so laid as to discriminate against interstate commerce or otherwise lay a direct burden upon it.
>
> * * * * * *
>
> *"There is here no attempt to tax property that is beyond the boundaries of the State. The tax was laid only upon property employed within the State and enforcement is left to the ordinary means of collecting taxes.* * * *" (p. 700.) (Italics supplied.)

The foregoing language clearly recognizes that the property of a foreign corporation in other jurisdictions may not validly be reached by a tax or fee on the privilege of doing a local business. It also emphasizes that a valid charge for the privilege of entering or remaining within a State to do a local business must be related to the privilege conferred, such as the property used or to be used, or the business carried on or to be carried on,

within the State.[5] The *Grosjean Case,* decided three weeks later, contains no reference to the *Southern Natural Gas Corporation Case,* which in itself is a significant indication that no principles applicable to privilege taxes on foreign corporations were affected by the sustaining of the Louisiana Chain Store Tax. The views expressed in the *Southern Natural Gas Corporation Case* are entirely consistent with the decisions relied upon by The Atlantic Refining Company on this appeal.

Conclusion

In view of the foregoing, it is respectfully submitted that there is no merit whatever to Appellee's claim that the tax here in question is supported by the decision in *Great Atlantic & Pacific Tea Co.* v. *Grosjean.* Accordingly, the determination of this appeal involves a consideration and application of the numerous decisions dealing with privilege taxes on foreign corporations, which decisions have been fully discussed in Appellant's main Brief.

That the Virginia entrance fee, imposed upon foreign corporations for the privilege of entering to do a local business, unlawfully burdens interstate commerce and reaches property in other jurisdictions, is believed to be plainly settled by *Cudahy Packing Co.* v. *Hinkle, supra.*[6]

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[5]See "Appendix A" to Appellants main Brief for examples of the manner in which most of the states have avoided the arbitrary measure of authorized capital stock.

[6]As Mr. Justice Brandeis correctly pointed out in his dissent in that case, the Washington filing fee held invalid there was indistinguishable from the Virginia entrance fee here involved. 278 U. S. 460 at p. 468. Even the court below admitted that the Washington filing fee was "in principle quite like the Virginia entrance fee." *Atlantic Refining Co.* v. *Commonwealth,* 165 Va. 492, 500.

That the Virginia act also infringes the equal protection clause, is believed to be settled by *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71.

The *Cudahy Packing Co.* and *Air-Way Electric Appliance Corp. Cases*[7] have finally restored a large measure of certainty to this important field of constitutional law, and have thereby eliminated the confusion and doubt occasioned by the now "disapproved" decision in *Baltic Mining Co.* v. *Mass.*, 231 U. S. 68, and its off-spring, *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500. State courts in numerous jurisdictions, endeavoring to adjust their rulings to the mandate of this Court, have recently followed the *Alpha Portland Cement Co.*, the *Air-Way Electric Appliance Corp.* and the *Cudahy Packing Co. Cases*, and accordingly have held invalid charges imposed either at the time of entrance or thereafter, whenever based upon the total authorized capital of foreign corporations.[8]

The decision by the Virginia court below, which is the subject of this appeal, is believed to be the only case decided since 1918, and not subsequently overruled or reversed, which sustains a charge upon a foreign corporation measured solely by total authorized capital stock, where such corporation has property situated in other jurisdictions, and is also engaged in interstate commerce.

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[7]Together with *Alpha Portland Cement Corp.* v. *Mass.*, 268 U. S. 203.

[8]*Perkins Mfg. Co.* v. *Jordon*, 200 Calif. 667, 254 Pac. 551; *Badger* v. *Crockett*, 70 Utah 265, 259 Pac. 921; *Minneapolis Steel & Machinery Co.* v. *Crockett*, 263 Pac. 926, 71 Utah 211; *Chicago, etc., Ry.* v. *Harman*, 295 Pac. 762, 89 Mont. 1; *State* v. *Liggett & Myers Tobacco Co.*, 171 S. C. 511, 172 S. E. 857; *Montgomery Ward & Co.* v. *Becker*, 69 S. W. (2d) 674, 334 Mo. 789; *Great Northern Ry. Co.* v. *State*, 147 Wash. 630, 267 Pac. 512; and *State ex rel. Borden Co.* v. *Dammann*, 224 N. W. 139, 198 Wisc. 265.

If the opinion below is now affirmed by this Honorable Court, it is respectfully submitted that the law on this subject will again revert to its former state of confusion and uncertainty, and the courts of more than a dozen States will have to revise or reverse their positions with respect to authorized capital stock as a legitimate measure for privilege taxes on foreign corporations.

Of course Appellant recognizes that the foregoing considerations, however important, do not warrant the perpetuation of an incorrectly decided doctrine. It is submitted, however, that the doctrine established by this Court in *Western Union Telegraph Co.* v. *Kansas, supra,* and more recently reaffirmed in *Cudahy Packing Co.* v. *Hinckle, supra,* is eminently sound in principle and should indeed be perpetuated. This doctrine, briefly stated, is that the total authorized capital stock of a corporation "represents all of its business of every class and all of its property wherever located,"[9] and that therefore a tax or fee imposed upon a foreign corporation for the privilege of entering or remaining to do a local business measured by such capital stock "is essentially and for every practical purpose a tax" on all of its business, both interstate and intrastate, and on all of its property wherever located, in violation of the commerce and due process clauses of the Federal Constitution. Moreover, the further doctrine, equally sound, was established by the *Air-Way Electric Appliance Corporation Case,* to the effect that *authorized* capital is an arbitrary and unreasonable measure for a privilege tax upon foreign corporations, bearing no relation whatever to the privilege conferred and therefore violating the equal protection clause of the Fourteenth Amendment.

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[9] *International Paper Co.* v. *Mass., supra,* at p. 142.

Accordingly, Appellant respectfully submits that the decision by the court below is contrary to the controlling decisions of this Court, is contrary to all state court decisions on this subject decided since 1918, and is plainly violative of sound and settled principles of constitutional law; and that therefore the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 961 [redacted] 1

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

STATEMENT OF APPELLEE OPPOSING JURISDICTION.

ABRAM P. STAPLES,
Attorney General of Virginia;
W. W. MARTIN,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 961

THE ATLANTIC REFINING COMPANY,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

STATEMENT OF APPELLEE OPPOSING JURISDICTION.

The Validity of the Identical Statute Here Challenged Applied in Similar Circumstances Has Been Upheld by a Prior Decision of This Court, and, Therefore, No Substantial Federal Question is Presented.

The validity of the identical statute here challenged, under the provisions of which the tax complained of was imposed (Acts of General Assembly of Virginia, 1910, Chapter 53, Section 38a, Page 79, now Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930), applied

in similar circumstances, was upheld in *General Railway Signal Company* v. *Virginia,* 246 U. S. 500, and the statute has not been amended since that decision. See also *Western Gas Construction Company* v. *Virginia,* 276 U. S. 597 (Mem.). Therefore, no substantial Federal question is presented.

Hannis Distilling Co. v. *Baltimore,* 216 U. S. 285;

Equitable Life Asssurance Society v. *Brown,* 187 U. S. 308;

Leonard v. *Vicksburg, S. & P. R. Co.,* 198 U. S. 416;

Levering & Garrigues Co. et al. v *Morrin et al.,* 289 U. S. 103;

Utley et al. v. *City of St. Petersburg,* 292 U. S. 106;

Ralph Sollitt & Sons Construction Co. v. *Virginia,* 292 U. S. 599.

General Railway Signal Company v. Virginia, 246 U. S. 500, Has Not Been Overruled by Cudahy Packing Company v. Hinkle, 278 U. S. 460.

Appellant's Chief reliance is based on the theory that *General Railway Signal Company* v. *Virginia, supra,* has been overruled by *Cudahy Packing Company* v. *Hinkle, supra.* The court below also conceived this to be the pivotal issue when it said:

> "As indicated, the narrow issue is this: Has the Cudahy case overruled the General Railway Signal Company case and the Western Gas Construction Company case? The issue is too serious to warrant us in believing that the Supreme Court with an opportunity to express itself would have been content to do this by inference only."

The discussion in the opinion below makes necessary only a bare summary of the differences in the nature, operation

and effect of the Washington and Virginia exactions as applied to the existing facts.

In the *Cudahy Packing Company* case *additional* filing fees, because of *increased* capital and annual license taxes, both reckoned upon authorized capital stock and with a maximum limit of $3,000, were demanded of a foreign corporation already admitted to do business in Washington and long carrying on a closely associated interstate and intrastate business there, in the conduct of which it had acquired substantial property in that State. Other obvious yardsticks for the measure of the taxes were present.

The statute here challenged, *in effect for more than thirty years,* as applied to the facts present in the *General Railway Signal Company* case, required of a foreign corporation a single entrance fee with a maximum limit of $5,000, based upon, but not varying in direct proportion to, its authorized capital stock, as one of the conditions precedent to its securing the *right* to do intrastate business in Virginia in corporate capacity.[1] That Virginia is not covertly attempting to use its powers to attain unconstitutional results is forcibly brought out in the case of appellant here, which has for a number of years carried on an interstate business in this State without payment or demand of the entrance fee, the fee only being required when it applied for a certificate of authority to do local business in its own name.[2] The tax, being a pure entrance fee, could not be measured by local business done, for it could have done no such business lawfully; it could not be measured by prop-

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[1] For other conditions precedent, see Sec. 3847 of the Code of Virginia, as amended by Acts of Assembly of 1926, page 482, included herein as Appendix A.

[2] Compare *Railway Express Agency* v. *Virginia,* 282 U. S. 440.

erty used in local business, as manifestly it could have none so used.[3] The effect of the Virginia tax is as if a flat entrance fee were imposed upon a foreign corporation, based upon the size of the corporation, that being, before admission, the best standard available to anticipate and measure the value of the right granted.

General Railway Signal Company v. *Virginia, supra,* was decided subsequent to many leading decisions of this Court in which privilege taxes imposed by States upon foreign corporations were exhaustively considered, notably, *Western Union Co.* v. *Kansas,* 216 U. S. 1; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Looney* v. *Crane Co.,* 245 U. S. 178; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. It was likewise decided after the enunciation of the doctrine of "unconstitutional conditions".

The fact that the entrance fee involved here, as in *General Railway Signal Company* v. *Virginia, supra,* is the only State exaction of a similar nature which has been passed upon by this Court, required as a condition precedent to the right to do intrastate business therein before any such business is done, clearly distinguishes it from all other cases and makes pertinent the following statement from *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 140, 141:

> "Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the

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[3] At the time of entrance appellant had no property in Virginia used even in interstate commerce. See printed record before the Supreme Court of Appeals of Virginia, pages 69, 70, 71.

questions presented have varied accordingly. In disposing of these questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy."

And it was subsequent to the establishment of "the general principles" which are "no longer * * * open to controversy" that *General Railway Signal Company* v. *Virginia, supra,* was decided.

Conclusion.

For the reasons stated it is respectfully submitted that the appeal herein does not present a substantial Federal question.

ABRAM P. STAPLES,
Attorney General of Virginia;
W. W. MARTIN,
Assistant Attorney General,
Counsel for Appellee.

APPENDIX A.

Section 3847 of the Code of Virginia:

"Every incorporated company doing business in this State shall have an office in the State at which all claim against the company due residents of the State may be audited, settled and paid; provided, however, that no foreign corporation which deposits securities with the treasurer of the Commonwealth for the protection of its patrons in Virginia shall be required to maintain an office in this State for such purpose. Every such company incorporated under a jurisdiction beyond the limits of the State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State corporation commission (a) a written power of attorney executed in duplicate, appointing the secretary of the Commonwealth of this State and his successor in office its agent upon whom all lawful process shall be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation; and (c) a certificate of the auditor of public accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said State corporation commission, a certificate of authority to transact business in the State. It if (If it) shall be made to appear to the State corporation commission that said corporation has complied with the law relative to the obtaining of a certificate of authority for foreign corporations of the character of the applicant corporation, then said State corporation commission shall issue to said corporation a certificate of authority to transact business in the State. Said commission shall file and preserve in their office one copy each of the power of attorney, charter, certificate of the auditor, and a certificate of the commission granting such certificate of authority, and forward copies of the said documents to the secretary of the Commonwealth, who shall file and preserve the same in his office.

"If the charter of any foreign corporation thus authorized to transact business in this State is amended, or revised, two duly authenticated copies of such amendment or revision shall be presented to the State corporation commission and filed as copies of the original charter are required to be filed, and the fee required by law in such amendment or revision shall be paid in the manner prescribed by law.

"Any foreign corporation which has complied with the law, relative to domestication in this State, and whose certificate of authority to do business in this State has been surrendered or revoked and annulled, shall, upon re-entering the State, be required to pay the entrance fee and all other fees required by law, incident to domestication, and execute and file the power of attorney required herein, but such corporation shall not be required to again file copies of its charter or any amendment thereto heretofore filed.

"Such corporation shall pay the clerical fees for such certificate of authority and for filing such papers as prescribed by law.

"The provisions of this act, as amended, shall apply to foreign corporations licensed at the time of the passage of this act as well as to those thereafter licensed."

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OCTOBER TERM, 1936

No. [redacted] 1

THE ATLANTIC REFINING COMPANY,
Appellant,
vs.
COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA

Brief for Commonwealth of Virginia

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 40

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APPEAL FROM THE SUPREME COURT OF APPEALS
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Brief for Commonwealth of Virginia

OPINION BELOW

The opinion below is officially reported in Volume 165 of the Virginia Reports, beginning at page 492.

JURISDICTIONAL QUESTION

The Commonwealth of Virginia, by her attorneys herein, pursuant to Paragraph 3, Rule 12 of the Rules of this Court, filed a statement opposing the jurisdiction of this Court on the ground that no substantial Federal question was presented by this appeal, to which statement reference is respectfully made.

STATEMENT OF THE CASE

The facts as found by the State Corporation Commission are included in the Record at pp. 45-65. The court below approved these findings, but summarized them (R. pp. 208-210).

The Statement of the Case, in so far as it is confined to facts proved, contained in Brief for Appellant (pp. 2-8), is correct. However, the following facts are worthy of emphasis:

Prior to January 22, 1930, appellant had for six years or more done in its own name a purely interstate business in Virginia without payment or demand of the entrance fee (R. pp. 27-29).

At the time of entrance appellant had done no local business in Virginia and owned no property in Virginia —even property used in its interstate commerce (R. pp. 27, 28, 29).

The State Corporation Commission made certain findings of fact with respect to the nature and extent of the business conducted by appellant's subsidiaries, and by appellant, after entry into the State and payment of the entrance fee complained of. As the validity of the fee must necessarily be determined by the facts as they ex-

isted at the time of its payment, we cannot perceive how facts relating to the business of the subsidiaries or to appellant's own manner of conducting its business after entrance can have any relevancy to the question here involved. However, since such findings of fact have been made, we will briefly refer to them. The Commission found (R. p. 62) that the interstate business of appellant and its intrastate business *after entrance* were capable of practical separation, a finding approved by the court below (R. pp. 209, 213). For example, appellant operates in Virginia local service stations where gasoline and oil are sold to the retail trade. These service stations are in charge of local employees of appellant and are supplied with the products they sell from bulk stations also located in Virginia. Even tires, tubes and accessories are sold at retail at these service stations. The operators of these stations keep books and report to the District Manager, whose office is in Richmond, Virginia. Again, appellant sells gasoline and oils to more than two hundred other service stations in Virginia owned by others. These service stations are supplied for the most part by appellant's bulk stations located in Virginia (R. pp. 33-41).

The invested capital of appellant is approximately one and one-third times greater than its authorized capital (R. p. 31 and Brief for Appellant, p. 6).

Appellant has not been authorized to issue and has not issued any non-par stock. This fact is disclosed by charter of appellant filed as an exhibit in court below, but on account of its length omitted from the Record here by stipulation.

STATUTE INVOLVED

Acts of the General Assembly of Virginia, 1910, Chap. 53, Sec. 38a, p. 79, now Sec. 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930. For the sake of brevity it is not here again printed since it is found in full in the Record at page 211 and in Brief for Appellant at pages 4 and 5, and is also summarized below.

Virginia Statutes Imposing Taxes on Domestic and Foreign Corporations.

The taxes imposed on domestic and foreign corporations are summarized as follows:

A. Domestic Corporations.

1. Charter Fee (Sec. 206 Tax Code).

   Where maximum authorized capital stock is $50,000, or less, $10;

   Over $50,000 and less than $3,000,000, twenty cents for each $1,000;

   $3,000,000 or more, $600.

2. Annual Registration Fee (Sec. 210 Tax Code).

   Where maximum authorized capital stock is $15,000 or less ..... $ 5.00
   Over $ 15,000 and not over $ 50,000.... 10.00
   Over $ 50,000 and not over $100,000.... 15.00
   Over $100,000 and not over $300,000.... 20.00
   Over $300,000 ..... 25.00

3. Annual Franchise Tax (Sec. 211 Tax Code).

   Where the authorized maximum capital stock is twenty-five thousand dollars, and under, ten dollars;

Over twenty-five thousand dollars, and not in excess of fifty thousand dollars, twenty dollars;

Over fifty thousand dollars, and not in excess of one hundred thousand dollars, forty dollars;

Over one hundred thousand dollars, and not in excess of three hundred thousand dollars, sixty dollars;

Over three hundred thousand dollars, and not in excess of five hundred thousand dollars, one hundred dollars;

Over five hundred thousand dollars, and not in excess of one million dollars, two hundred dollars;

And for all in excess of one million dollars, and not greater than fifty million dollars, an additional sum of ten dollars for each hundred thousand dollars or fraction thereof in excess of one million dollars;

And for all in excess of fifty million dollars, and not greater than one hundred million dollars, the further additional sum of seventy-five dollars for each million dollars, or fraction thereof in excess of fifty million dollars;

And for all in excess of one hundred million dollars, and not greater than one hundred and fifty million dollars, the further additional sum of fifty dollars for each million dollars, or fraction thereof in excess of one hundred million dollars;

And for all in excess of one hundred and fifty million dollars, and not greater than three hundred million dollars, the further additional sum of twenty-five dollars for each million dollars, or fraction thereof in excess of one hundred and fifty million dollars; and for all in excess of three hundred million dollars, the further additional sum of ten dollars for each million dollars,

or fraction thereof in excess of three hundred million dollars.

4. Income Tax (Tax Code, Sections 52-54, inclusive).

Three per cent upon "net income" earned from *domestic* business.

B. Foreign Corporations doing local business.

1. Entrance fee (Sec. 205 Tax Code, Acts 1900, p. 77).

For a company whose maximum capital stock is five thousand dollars or under, twenty-five dollars;

For a company whose maximum capital stock is over five thousand dollars, and not to exceed ten thousand dollars, fifty dollars;

Over ten thousand dollars and not to exceed twenty-five thousand dollars, seventy-five dollars;

Over twenty-five thousand dollars, and not to exceed fifty thousand dollars, one hundred and twenty-five dollars;

Over fifty thousand dollars, and not to exceed one hundred thousand dollars, two hundred dollars;

Over one hundred thousand dollars, and not to exceed three hundred thousand dollars, three hundred and twenty-five dollars;

Over three hundred thousand dollars, and not to exceed five hundred thousand dollars, four hundred and fifty dollars;

Over five hundred thousand dollars, and not to exceed eight hundred thousand dollars, five hundred and seventy-five dollars;

Over eight hundred thousand dollars, and not to exceed one million dollars, seven hundred and fifty dollars;

Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

Over ninety million dollars, five thousand dollars.

2. Annual Registration Fee (Sec. 210 Tax Code).

   Same as domestic corporations.

3. Annual Franchise Tax.

   None.

4. Income Tax (Sections 52-54, inclusive, Tax Code).

   Same as domestic corporations.

In addition to the foregoing, the State imposes a tax upon intangible property of both foreign and domestic

corporations, and the cities, towns and counties impose local taxes on tangible personal property and real estate. The rate is the same upon domestic and foreign corporations in all cases.

A Virginia corporation the same size as appellant (authorized capital one hundred million dollars) is required to pay a charter fee of $600, and *every year* a franchise tax of $8,850 (Sec. 211, Tax Code, *supra*), while appellant is required to pay only an entrance fee of $5,000, and thereafter pays no franchise tax whatever.

QUESTION PRESENTED

Whether a single entrance fee with a maximum limit of $5,000, measured by, but not varying in direct proportion to, its authorized capital stock, required of a foreign corporation (heretofore also engaged in interstate commerce in this and other states) as one of the conditions precedent to its securing the right to do intrastate business in Virginia in corporate capacity, before any such business is done and before the corporation has acquired any property in the State, is arbitrary or unreasonable, or is a tax upon the corporation's property outside the State so as to constitute a taking of property without due process of law, or results in a denial of the equal protection of the laws, or an unlawful burden upon interstate commerce, where the State imposes no annual or other franchise tax upon the corporation after its admission.

SUMMARY OF ARGUMENT

The statute here challenged imposes a fee on a foreign corporation as a condition precedent to obtaining

a certificate of authority to do local business in Virginia. No restrictions are imposed by any Virginia statute on the corporation's activity after entrance, other than is applicable to domestic corporations. No annual franchise tax or any tax on the right to continue to do business is imposed on foreign corporations, though a very substantial annual franchise tax is required of Virginia companies. The privilege or right obtained by the foreign corporation upon being admitted to the State is to engage in the transaction of intrastate business on the same terms as domestic corporations, and to employ *all of its capital stock* in the State if it so desires.

There is an obvious and important distinction between an *entrance fee* imposed upon a foreign corporation as a condition precedent to its right to enter the State and begin to transact an intrastate business therein, and an annual franchise tax, or similar tax, imposed *after it has been admitted,* as a condition that it *shall not be expelled.* Every decision of this Court relied on by appellant involved the application of the statutes to companies already admitted and the payment of the tax was required *in order to avoid expulsion* of said corporations which had built up a business and acquired property rights in the State.

The amount of the entrance fee is not determined by a percentage of its authorized capital stock, but is fixed by the class within which the amount of such stock places it. For illustration,, one classification is corporations with an authorized capital stock of $1,000,000 and not over $10,000,000. There is a maximum fee of $5,000. It is obvious that such a broad basis of classification does not reflect an effort by the State to tax property outside its jurisdiction.

The fee is based upon the sound principle that the size of a corporation is the best criterion to determine or measure the value of the right conferred. Since this right is a perpetual one, the ultimate size of the corporation, rather than its present size, is selected to determine the amount of the entrance fee. The authorized capital stock is the best index of the corporation's ultimate size.

The constitutional validity of the identical statute here challenged was sustained by this Court in *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, in which it was held that the entrance fee imposed is not a tax upon property outside the State and is not arbitrary or unreasonable. Neither that case, nor the principles upon which the decision therein was based, have been overruled.

The entrance fee does not deprive the appellant of the equal protection of the laws. All corporations falling within the same class are required to pay the same fee. This classification has been held by this Court, as above stated, not to be unreasonable or arbitrary. But prior to admission to a state a foreign corporation cannot invoke the benefit of the Equal Protection Clause in relation to intrastate business. It is not entitled to any protection whatsoever with respect thereto.

ARGUMENT

A

The Virginia Entrance Fee in its Operation and Effect as Applied to Appellant Does Not Tax Its Property Beyond the Jurisdiction of the State Nor Unlawfully Burden Its Interstate Commerce.

1. The History, Nature, Operation and Effect of the Challenged Statute.

Since her Constitution of 1902, when the State Corporation Commission was created with the power to issue charters to domestic corporations and licenses to foreign corporations, Virginia has required foreign corporations seeking entrance to do a local business to pay an entrance fee, determined by a classification based upon authorized capital stock, as a condition precedent to securing the right. Acts of Virginia, Extra Session of 1902-3-4, Chap. 148, Sec. 38, page 179.[1]

In 1910 the statute was enacted in its present form and remained unchanged up to the time the fee was paid by appellant.

The Virginia fee is purely an entrance fee, a fee required of a foreign corporation before admission as one

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[1] Indeed such a requirement was made mandatory by the Constitution itself, Article 12, Sec. 157, providing in part as follows:

"Provision shall be made by general laws for the payment of a fee * * * by every foreign corporation upon obtaining a license to do business in this State * * *. No foreign corporation shall have authority to do business * * * until it shall have first obtained from the Commission a license to do business in this State * * *."

of the conditions precedent to the corporation obtaining the *right to do* local business in corporate capacity as distinguished from a tax for the actual doing of business. While cognizant of the greater power that a State may exercise over corporations of its own creation, the enactment here attacked is analogous to the charter fee paid by a domestic corporation. This is the construction adopted by the court below and by the State Corporation Commission (R. pp. 92, 208).[2]

The fee, being payable before entrance to do local business, cannot be measured by property employed in local business in the State, as obviously the corporation can have no property used in this class of business. Looking through form and considering substance, it is manifest that Virginia is not taxing or attempting to tax property beyond her jurisdiction, but, on the contrary, the fee not varying in direct proportion to the capital stock, is in effect imposing a series of flat fees for the privilege of admission, measured by the sizes of the respective corporations applying. Often a tax may be in form a privilege tax, but in reality a tax on property. However, the fee here cannot be considered a property tax at all. It has no connection with property;

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[2] As stated by the court below (R. p. 212), charter fees for domestic corporations are less than entrance fees for foreign corporations, yet the fact that Virginia does not penalize foreign corporations is manifest when it is considered that a domestic corporation of appellant's size would be required to pay an *annual* franchise tax of $8,850 (Acts of Virginia, 1902-3-4, p. 182, as amended, ibid. 1926, p. 904; now, Sec. 211 of Tax Code of Virginia, Michie's Code, 1930), while a foreign corporation is not required to pay this tax or any similar tax.

it would be the same if the corporation were a new one, had sold none of its capital stock and had little or no property. It should not be overlooked that the fee is not for the first year's business, or for that of any number of years. It admits the corporation perpetually, and the right acquired includes the right to employ all or any part of its authorized capital stock in domestic business in Virginia. Its business for the first year or the first few years may be small, but thereafter may be immeasurably increased. Authorized capital[3] is the best index, not necessarily of the present size, but of the ultimate permanent size of the corporation, and permanent size is, before admission, the best standard available to anticipate and measure the value of the franchise conferred by admission. It follows that the fee thus measured has an intimate relation to the value of the privilege or franchise granted.

So, also the fee from its nature does not unlawfully burden interstate commerce. It is not and cannot, as is usual with *annual taxes,* be measured by the amount of local business done, since at the time of entrance into the State no local business has been or can be legally conducted therein; it is, of course, not measured by interstate business conducted in or out of the State, Virginia recognizing that she cannot require a certificate of authority to do purely interstate business therein. This

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[3] If appellant's view of the tax be correct, it would appear that so far as the commerce and due process clauses are concerned the Virginia fee would be equally invalid if measured by *issued* rather than authorized capital. In fact, if measured by issued capital, it would have a far closer connection with property.

characteristic of the Virginia law is strikingly and convincingly brought out in the case of appellant by the admitted fact that it engaged in purely interstate commerce in Virginia for at least six years prior to January 22, 1930 (the date it sought a certificate of authority to do intrastate business), and its right to conduct such business was never challenged. No attempt was made to force appellant to obtain a certificate of authority, nor was any claim asserted that appellant was subject to any charge or fee for the privilege of conducting its interstate business in Virginia.

Thus it appears the Virginia exaction fully meets the letter and the spirit of the conditions recently laid down by this Court (although the subject of the tax is not the same) in *Cooney* v. *Mountain States Tel. & Tel Co.*, (1935) 294 U. S. 384, 393:

> "* * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. * * *"

It is clear, therefore, that the entrance fee here challenged does not tax property beyond the jurisdiction of the State, or unlawfully burden interstate commerce, or arbitrarily and unreasonably discriminate between foreign corporations.

2. THE VALIDITY OF THE IDENTICAL STATUTE, APPLIED IN SIMILAR CIRCUMSTANCES, HAS BEEN UPHELD IN GENERAL RAILWAY SIGNAL CO. V. VIRGINIA, 246 U. S. 500, AND NEITHER THIS CASE NOR THE PRINCIPLES UPON WHICH THE DECISION THEREIN IS BASED HAVE BEEN OVERRULED.

The Virginia entrance fee was not assailed until 1916 when it was upheld by the court below. *General Railway Signal Co.* v. *Commonwealth,* 118 Virginia 301. The decision was affirmed by this Court in 1918. *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500. The fee again came before this Court in 1928 in *Western Gas Construction Co.* v. *Virginia* (Mem.) 276 U. S. 597, wherein this Court affirmed the State Supreme Court (147 Va. 235), upon the authority of *General Railway Signal Co.* v. *Virginia, supra.*

The court below took the view in this case (R. p. 212) that the validity of the fee was sustained both by that court and by this Court in the *Western Gas Construction Company Case, supra.*

That Virginia has relied implicitly on these decisions of this Court is manifest from the fact the statute now challenged is the identical statute reviewed in the *Signal Company* and *Western Gas Construction Company Cases,*[4] and similarly applied.

Appellant contends that the only objection to the statute considered in the *Signal Company Case* was that

[4] The statute was amended in 1936 for the *sole* purpose of requiring a minimum fee of $50 of certain corporations all of whose stock is owned by the United States of America (Acts of Virginia, 1936, p. 1).

the tax was a burden on interstate commerce, and that the question of due process was not raised or considered. The argument has little merit, for it is respectfully suggested that, if this Court had been of opinion in that case that the effect of the fee as there applied was to reach the total capital of the corporation employed in interstate and intrastate business in other States, it would have declared it to be invalid under the Commerce Clause. Certainly in *Looney* v. *Crane,* 242 U. S. 178, and the other cases cited and distinguished by this Court in the *Signal Company Case,* both clauses were invoked. Furthermore, this Court has uniformly applied the same test in determining the validity of statutes imposing franchise taxes on foreign corporations, namely, whether the tax is intended as, or is in effect, a tax upon property outside the State, and when found so to be, the tax has been held to violate the due process clause and also the commerce clause. The tax here involved has, therefore, necessarily been subjected to this test and found not to be a tax upon the property of a foreign corporation.

It is well established that statutes of this nature violate the due process and commerce clauses when the tax thereby imposed is designed as, or is in effect, a tax upon property of the corporation outside the State, or when the tax is arbitrary or unreasonable. As before stated, this identical statute has been subjected to this test by this Court in the *General Railway Signal Company Case,* and found to be not a tax upon such property, and not arbitrary or unreasonable.

Appellant contends, however, that, although the *Signal Company Case* has not been overruled, it was

grounded on principles which this Court has since overruled by the *Cudahy Packing Company Case,* and therefore the *Signal Company Case* should now likewise be overruled to conform to the alleged new principles. A review of these two cases will disclose the unsoundness of this argument.

GENERAL RAILWAY SIGNAL COMPANY v. VIRGINIA, 246 U. S. 500.

Before discussing this case, the circumstances under which it was decided should be considered. It was argued March 11, 1918, and decided April 15 of that year. Three months before it was argued, December 10, 1917, *Looney* v. *Crane, supra,* was decided, after having first been argued in May, 1917, and, after being restored to the docket, reargued on November 6, 1917. On March 4, 1918, *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146, were decided. These cases all deal with the validity of annual franchise taxes based solely on authorized capital stock of foreign corporations. They were decided exactly one week before the *General Railway Signal Company Case* was argued. In the *International Paper Company Case* the opinion says: "Our last decision on the subject was given during the present term in *Looney* v. *Crane.* The case was orally argued a second time at our request and was much considered." The opinion also summarized the principles to be applied in testing the validity of statutes of this type, as follows (246 U. S. 141-142):

"1. The power of a state to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister state—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

"2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

"3. Consistently with the due process clause, a state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state.

"5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital

stock of the corporation represents all its business of every class, and all its property, wherever located.

"6. When tested, as it must be, by its substance —its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state."

One week after enunciating the above principles, and having them fresh in mind, this Court came to consider the validity of the statute now again brought here by this appeal. In the *General Railway Signal Co.* v. *Virginia Case,* a New York corporation, with an authorized capital stock of $5,000,000, was fined by the Virginia State Corporation Commission for doing business within the State without first obtaining the required certificate of authority. The only business transacted or apparently contemplated was the installation of certain electric signals for the Southern Railway Company. The Signal Company had previously made and performed similar contracts, the total consideration for all of them over a period of about three years being $214,040. While it was necessary to employ labor in installing the apparatus, it was claimed that the material was sold in interstate commerce, and that the company was not transacting a local business in Virginia, which contention this Court rejected. It did not appear, however, that the corporation was employing a very considerable part of its capital stock in its intrastate business. The entrance fee imposed under the statute (the same here under consideration), was $1,000, which is the fee required of corpora-

tions where the authorized capital stock is between one million and ten million dollars. The Signal Company attacked the validity of the entrance fee as a burden on interstate commerce. In sustaining its validity, this Court found it to be not arbitrary or unreasonable, and not within the prohibitions established by *Looney* v. *Crane, supra; International Paper Co.* v. *Massachusetts, supra,* and *Locomobile Co.* v. *Massachusetts, supra,* which were referred to in the opinion as not applicable.

This Court unanimously held, therefore, that the statute did not "tax property belonging to a foreign corporation and neither located nor used within the confines of the State," in violation of the rule above quoted from *International Paper Co.* v. *Massachusetts,* and that the entrance fee was not a burden on interstate commerce. On the contrary it was decided that the question of the validity of the statute was controlled by the principles enunciated in four other cases, *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350; *Kansas City, etc., R. Co.* v. *Botkin,* 240 U. S. 227, and *Kansas City, etc., R. Co.* v. *Stiles,* 242 U. S. 111.

A consideration of these four cases will render obvious the true principles upon which the Signal Company decision was based, and they will be briefly reviewed.

Kansas City, etc., R. Co. v. *Stiles,* 242 U. S. 111.

In this case an Alabama statute authorized two or more connecting railroad corporations of different states to consolidate and, after executing and filing certain required papers, to become a consolidated Alabama corpora-

tion. Tennessee and Mississippi enacted similar statutes. Three companies, one of each of these states, filed the necessary papers and became an Alabama Consolidated Corporation. The case before this Court was an attack upon the validity of an annual franchise tax graduated upon paid up capital stock. Since the statute permitting the consolidation necessarily contemplated that part of the property represented by the capital stock would be outside the state, the company contended that the tax was, in effect, laid on such property, and was a direct burden on interstate commerce. In rejecting this objection, this was said (242 U. S. at p. 117):

> "The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama."

And the Court held that the tax was not in any sense a property tax, but was a franchise tax which the state had the power to levy, and that a tax of this nature may properly be measured by capital stock even though same represented, in part, "property without the taxing power of the state."

The citation of the foregoing case in support of the opinion in *General Railway Signal Co.* v. *Virginia* constitutes a clear recognition of the analogy between a pure entrance fee and a franchise tax imposed by a state on corporations of its own creation. From the

standpoint of transacting local business, a foreign corporation may be said to have no existence in Virginia prior to admission, and the entrance fee may be regarded as a tax upon the right of the foreign corporation to come into existence for this purpose in Virginia. Clearly the same measure employed to determine the amount of a franchise tax on a domestic corporation may be used as a measure of an entrance fee.

Kansas City, etc., R. Co. v. *Botkin*, 240 U. S. 227.

This case involved the validity of an annual fee imposed by the state of Kansas upon domestic corporations. The fee was graduated according to paid up capital stock increasing until the maximum of $2,500 was reached. Its validity was challenged upon the ground "that the tax is a direct burden upon interstate commerce and is laid upon property outside the state." This Court held the fee "to be simply a tax on the privilege of being a corporation,—on the primary corporate franchise granted by the state" and said that "The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power * * *. The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83)

to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts;' and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Concluding, the Court said:

> "For similar reasons, the contention cannot be sustained that the tax was one on property beyond the jurisdiction of the state. Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property. *But the present tax cannot be regarded as a property tax at all* (Italics supplied).

These principles obviously were held in *Signal Co.* v. *Virginia* to be applicable to the Virginia Entrance fee.

Southwestern R. Co. v. *Arkansas,* 235 U. S. 350.

In this case an annual franchise tax was imposed by Arkansas upon the privilege of a foreign railroad corporation to do an intrastate business. The tax was measured by the proportion of the company's capital stock represented by property owned and used in the transaction of business in the state. The validity of the tax was assailed on the ground that the company's property in the state was used in both interstate and intrastate commerce and the tax was a direct burden upon the former.

The State Supreme Court had upheld the tax as being levied upon the right of the Missouri Corporation *to exist as a corporation in Arkansas,* concerning which this Court said:

> "We therefore accept the construction of Act No. 112 that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state * * *."

The validity of the tax was sustained.

The close analogy between a franchise tax on a domestic corporation's right to exist, and an entrance fee permitting a foreign corporation *to exist in the state,* is clearly indicated in the opinion in this case.

The analogy between a charter fee and an entrance fee is even more close. The right of a state to measure the charter fee by authorized capital has never been questioned.

Baltic Mining Co. v. *Massachusetts,* 231 U. S. 68.

This is the case which appellant contends established the principle that the maximum limit characteristic of a state franchise tax measured by authorized capital saves its constitutionality. We can find no such principle laid down in the opinion. This feature of the tax is merely mentioned once. It is not in any manner emphasized or elaborated upon, but is treated in the opinion as one of the numerous facts to be considered in applying the appropriate legal principles to determine whether

property without the state is being subjected to the tax.

The Massachusetts statute imposed upon foreign corporations an annual excise tax of one-fiftieth of one per cent of its authorized capital stock, which the Supreme Court of Massachusetts construed as not a tax upon property, but "for the commodity or privilege of having an establishment in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here." Imposition of the tax was objected to on the same three grounds raised by appellant to the Virginia Entrance fee,—that the tax was a direct burden on interstate commerce and violated the due process and equal protection clauses of the Constitution.

The court took special care to emphasize the principle that "every case involving the validity of a tax must be decided upon its own facts." Emphasis is also laid upon the fact that the tax was not applicable to foreign corporations "whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation." Consideration was also given to the fact that the assets of the corporation exceeded about five times the authorized capital stock. The only reference to the maximum limit feature is contained in the following quotation from the opinion (231 U. S. 87):

> "* * * While the tax is imposed by taking a percentage of the authorized capital, the agreed facts

> show that the authorized capital is only a part of the capital of the corporations, respectively. In the *Baltic Mining Company Case,* the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the *White Dental Company Case* the authorized capital is $1,000,000, while the assets aggregate $5,711,718.20. Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, *it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed* * * *" (Italics supplied).

The language italicized above, which, standing alone, might seem to authorize the State to *"impose"* a tax upon property beyond its jurisdiction, but which was clearly intended to mean only that such a tax may, in proper cases, *be measured* by such property, seems to have resulted in some confusion in the interpretation of the opinion, and it obviously was this, and not the "maximum limit" feature which called forth the disapproval in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218, which was contained in the following quotation from the *Cudahy Packing Company Case, supra:*

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating

> or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved. *Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*"

This language is relied on by appellant as overruling the *Baltic Case* after the decision in the *Signal Company Case*, but the same thought had been previously expressed in *Looney* v. *Crane*, *supra* (decided four months before the *Signal Company Case*), where, after referring to several leading cases, including the *Baltic Case*, this is said (245 U. S. 189-190):

> "* * * The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but, on the contrary, in explicit terms declared that they did not conflict with them, and that they proceeded upon conditions peculiar to the particular cases.

"* * * In the first place, it is apparent in each of the cases that, as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether, by their necessary operation and effect, they were repugnant to the Constitution in the particulars stated, and this inquiry, it was expressly pointed out, was to be governed by the rule long ago announced in *Postal Teleg. Cable Co.* v. *Adams,* 155 U. S. 688, 698, that 'the substance and not the shadow, determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. *It is thus manifest on the face of all of the cases that they in no way sustained the assumption that, because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution*" (Italics supplied).

The opinion in *Cudahy Packing Co.* v. *Hinkle,* containing the quotation hereinabove referring to the *Baltic Case,* was written by Mr. Justice McReynolds, as was

also the opinion in *General Railway Signal Co.* v. *Virginia,* and it can hardly be argued that at the time he wrote the latter opinion he regarded the *Baltic Case* as "lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small." There is nothing to justify appellant's argument that the Virginia entrance fee was sustained under any such misconception of the *Baltic Case.*

While the characteristic of a reasonable maximum in a tax based on capital stock has been generally considered by this Court as a material consideration in determining whether the tax is laid upon property without the State, it has never been held to constitute a *test* of validity. In *International Paper Co.* v. *Massachusetts, supra,* this was said (246 U. S. 145):

> "In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Min. Co.* v. *Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney* v. *Crane Co.* True, the tax sustained in *Baltic Min. Co.* v. *Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax, which, as shown in that and other cases was a *material factor* in the decision * * *."

Baltic Mining Co. v. *Massachusetts,* therefore, clearly did not establish a principle that the maximum feature of a tax of this nature was a *test* of its validity, but merely that it was a "material factor" to be given con-

sideration along with other material facts in that case. This had been held to be the true construction of the *Baltic Case* by the opinion in *International Paper Co.* v. *Massachusetts,* above quoted from before the decision of *General Railway Signal Co.* v. *Virginia.* This Court has never held that such maximum feature is not to be given material consideration. *Cudahy Packing Co.* v. *Hinkle, supra,* does not so hold. We will now discuss this case.

Cudahy Packing Co. v. *Hinkle,* 278 U. S. 460.

In 1916 the Cudahy Packing Company, a Maine corporation, qualified to do a local business in Washington and thereafter "began to carry on closely associated interstate and intrastate business" in that State. In 1925 amendments of the taxing laws required foreign corporations to pay an increased filing fee in proportion to any increase in its authorized capital stock, and also an annual license fee, graduated according to its authorized capital stock, each having a limitation of $3,000. In 1927 the increased filing fee and the license fee for that year were demanded of the Company, payment of which was resisted. The Company owned only $40,000 worth of property in the State, and out of the Company's annual gross sales of $231,750,000, less than $650,000 represented intrastate business in Washington. When the Company entered the State in 1916 its authorized capital stock was $20,000,000, but had been increased to $45,000,000.

It thus appears that after the Company had complied with the 1916 requirements to engage in intrastate busi-

ness, this additional filing fee and license fee was imposed, based solely on the Company's authorized capital stock, though obviously other and more reasonable standards for measurement of the fees were available.

This Court held that applied to these facts and circumstances the taxes imposed were not unlike those in *Looney* v. *Crane Co., supra,* and that "Unless saved by the $3,000 limitation the Washington enactments are subject to the constitutional objections pointed out in *Looney* v. *Crane Co.* and must be denied effect." The opinion then refers to *Baltic Min. Co.* v. *Massachusetts,* and points out that under the particular facts in that case, where the corporate assets were four times the authorized capital and the statute carried a $2,000 limitation of the tax, the Court concluded *"that no direct substantial burden was imposed upon interstate commerce and that property beyond the State was not taxed."* The opinion further emphasizes what had previously been said in *Looney* v. *Crane Co., supra,* (before the decision in *Signal Co.* v. *Virginia*), that the *Baltic Case,* and other cases referred to, "in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution." (*Looney* v. *Crane,* 245 U. S. 178, 190). In the *Cudahy Packing Co. Case* the above principle is emphasized by the express statement that "*Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sus-

tained if relatively small. *This view did not harmonize with the principles approved by Looney* v. *Crane Co.,* and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*"

It thus appears from the opinion in the *Cudahy Packing Co. Case* that it was in *Looney* v. *Crane Co.* that the principle was first clearly stated that property beyond the State may not be taxed in any degree. The *Cudahy Case* also clearly states that *Baltic Min. Co.* v. *Massachusetts* did not hold any such principle, but that in that case "the Court concluded that no direct substantial burden was imposed upon interstate commerce, and that *property beyond the State was not taxed.*"

It is also clear from the two opinions above referred to that this Court never did enunciate a doctrine that property beyond the State might be taxed if there was a limitation on the tax. Since there never was any such rule, obviously the *Cudahy Packing Company Case* could not overrule it, though it did further clear up the misconceptions which had been entertained that the *Baltic Mining Company Case* promulgated a doctrine of that kind.

Nor does *Cudahy Packing Co.* v. *Hinkle* in any sense intimate that *in determining whether a State tax does reach property beyond the State,* a factor not to be given material consideration is the fact that the tax is subject to a reasonable limitation. On the contrary, the opinion shows that this feature of the tax *was considered in that case,* but was not sufficient to save its validity, *because the tax there did reach property beyond the State,* and the limitation was legally immaterial.

Appellant contends that the increased filing fee enacted after the Cudahy Packing Company's entrance into

Washington should be considered separately from the annual license fee, and that the filing fee was, upon principle, the same as Virginia's entrance fee. But this Court has in cases of this nature always considered together all the taxes imposed by a State upon a foreign corporation, in order to determine the purpose and effect of any one of them, and in *Looney* v. *Crane Co.*, where there was an annual franchise tax and a permit fee this Court expressly held them to be interdependent, and that the two must stand or fall together.

Comparison of the Virginia Entrance Fee With the Washington Filing and License Fees Involved in Cudahy Packing Co. v. Hinkle.

In considering the question whether the Virginia entrance fee is intended as or is in effect a tax upon property outside the State, the groups into which the corporations are classified to determine the amount of the fee is material. After the capital stock of $1,000,000 is reached, the first group embraces corporations with authorized capital stock ranging from over one million to ten million dollars, for which the fee is $1,000, the next group is from ten to twenty million, the next from twenty to thirty million and so on in groups, each covering a range of ten million dollars, until the last group, including all corporations with authorized capital stock over ninety million dollars, is reached, in which group the entrance fee is fixed at $5,000.

The Washington statutes, however, which were before this Court, in *Cudahy Packing Co.* v. *Hinkle,* required a filing fee of $750 for a foreign corporation

whose authorized capital stock was between one and two million dollars, and $10 additional for each $1,000,000, or major fraction thereof, of capital stock in excess of $2,000,000, with a limitation, however, of $3,000. An *annual* license fee was also required to be paid amounting to $150 where the authorized capital stock was between one and two million dollars, "and $10 for each $1,000,000, or fraction thereof, of capital stock in excess of $2,000,000," with a limitation on the annual fee of $3,000.

The distinction between the principles underlying these exactions from those applicable to the Virginia entrance fee is obvious. In Virginia the base of classification is a difference of ten million dollars of capital stock, while in Washington the difference between the classes was one million. In Virginia there is no annual license or franchise tax, while in Washington there was a substantial one based upon the same variation in capital stock as was applied to the filing fee.

In Washington, a corporation entering the state would have subjected itself in advance to this annual tax, based on its authorized capital stock, though after entrance other reasonable standards of measurement of such a tax would be available, while in Virginia a corporation entering does not encounter or assume this future burden, or any annual privilege tax.

Other Cases Cited by Appellant Decided Prior to General Railway Signal Co. v. Virginia

In its approach to a discussion of *Cudahy Packing Co.* v. *Hinkle* appellant's brief contains an elaborate discus-

sion and analysis of many decisions of this Court involving State exactions of foreign corporations, beginning with *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, and including *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Looney* v. *Crane Co.,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203. In view of the fact that all of these cases, with the exception of the *Alpha Portland Cement Co.* v. *Massachusetts,*[5] were decided prior to *General Railway Signal Co.* v. *Virginia,* a detailed discussion of them would only serve to unduly lengthen this brief. Suffice it to say that the Court in its opinions in these cases time and again adverted to the principle that each case involving the validity of a tax must be decided on its own facts.

Peculiarly apposite is this statement from the opinion in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 140, 141:

> "Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the questions presented have varied accordingly. In disposing of these questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been

[5] Since this case involved an annual excise imposed on a foreign corporation for the privilege of doing an *interstate* business, it is admittedly not in point.

> in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy."

Apposite, because in no case decided by this Court, except the cases involving the Virginia fee, has it ever had occasion to pass on a similar tax imposed under similar circumstances.

It has frequently been argued in this Court, as appellant now argues, in cases dealing with the power of the States to impose kindred exactions on foreign corporations, that subsequent decisions have overruled previous ones. The special facts here present make strikingly pertinent the language of Mr. Chief Justice White in disposing of this contention in *Looney* v. *Crane Co., supra,* (the principal authority for *Cudahy Packing Co.* v. *Hinkle).* After referring to *Baltic Mining Co.* v. *Massachusetts, supra,* and other cases, he said (245 U. S. 189):

> "* * * The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases."

3. THE VIRGINIA ENTRANCE FEE AS HERE APPLIED DOES NOT IMPOSE UNCONSTITUTIONAL CONDITIONS UPON THE ENTRANCE OF A FOREIGN CORPORATION.

The doctrine that a State may not require a foreign corporation as a condition precedent to entrance to yield

or bargain away rights guaranteed under the Federal Constitution is not new. It was firmly imbedded in the decisions of this Court when *General Railway Signal Co.* v. *Virginia, supra,* was decided, as appears from a review of decisions in *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, and *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583. But it is consistently held that with the State's power to exclude altogether, *Bank of Augusta* v. *Earle,* 13 Peter 519, *Railway Express Agency* v. *Virginia,* 282 U. S. 440, the deprivation of constitutional rights must be plain to render the statute invalid.

> "If the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." Kansas City, F. S. & M. Ry. Co. v. Botkin, 240 U. S. 227.

It will not be denied that the subject here is within the taxing power of the State—the *right* to do local business in corporate form, as distinguished from the actual carrying on of business. The right granted by Virginia of itself has no relation to the volume of business actually transacted, and to require a measure for the price for this *right* to be based on what is actually done within the State would represent a failure to distinguish between the right to do and the actual doing. Such a holding would have the effect of requiring Virginia to forfeit to a large degree its power to exclude, inasmuch as the corporation must be allowed to enter and do a local business before such a measure can be applied and the tax collected.

In the cases that have been before this Court involving invalid State requirements of foreign corporations the corporation has been compelled to submit to a condition to be fulfilled *after* entrance, or to submit to a condition imposed by a statute enacted after the corporation had been admitted. *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Southern Railway Co.* v. *Greene*, 216 U. S. 400; *Looney* v. *Crane*, 245 U. S. 178; *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 593; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

The Virginia statute, on the other hand, as applied here, requires the foreign corporation to submit to no condition after entrance—it stands on the same footing as domestic corporations (except the latter are required to pay an annual franchise tax). The act of entrance is a finality and a reasonable price is charged. As has been stated, the fee is analogous in many respects to the charter fee of a domestic corporation for the "right to be" a corporation, and this was obviously the view of the fee taken by this Court when it cited in support of its decision in *General Railway Signal Co.* v. *Virginia*, *supra*, the cases hereinbefore discussed.

The nature, operation and effect of the Virginia condition precedent to entrance vary materially from the annual charges and conditions imposed after entrance which have heretofore been held invalid by this Court. The distinction pressed has been clearly recognized by this Court and the appellate courts of Virginia, New York and Illinois. *People v. Laughman*, 249 N. Y. 369; *St. Louis-Southwestern Ry. Co.* v. *Stratton*, 353 Ill. 273.

See *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494; *People* v. *Latrobe*, 279 U. S. 421. *Atlantic Refining Co.* v. *Virginia*, 165 Va. 492.

Virginia is not contending, and emphatically does not desire to be understood as contending that there is no limitation to the exaction that may be demanded of a foreign corporation for entrance therein. But the purpose of a statute is of controlling significance. If a State under the guise of an alleged entrance fee should attempt to tax property beyond its jurisdiction or to unlawfully burden interstate commerce, its effort would be futile. This Court will not be bound by the mere wording of a State statute imposing a tax, nor allow constitutional provisions to be evaded by legislation which seeks to accomplish indirectly that which cannot be done directly. It will look to the purpose of an act from a consideration of its history and surrounding circumstances. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620. Compare *Educational Film Corp.* v. *Ward*, 282 U. S. 379.

But appellant does not attribute any covert motive to Virginia. Indeed, at this late date it may be doubted whether anyone would have the temerity to argue that this fee, which has been in effect for more than thirty years, with a most unusual legislative and judicial history, represents a deliberate effort on the part of the State to pervert its powers. Virginia has not yielded to the lure, as many States have, of amending this ancient statute for the purpose of obtaining a larger revenue from foreign corporations, nor has it imposed an annual charge on them for the privilege of continuing to do business in the State.

The announcement relied on by appellant in the Restatement of the Law of Conflict of Laws (Sec. 175, final draft 1934) is less authoritative than it seems. The proceedings in The American Law Institute, Vol. V, pp. 237, 239, show that this section is only a statement of common law principles and is not a restatement of constitutional law. The discussion of these constitutional questions is not complete and in the words of Mr. Morawetz, speaking of this section (p. 238):

> "* * * There are a great many qualifications of these doctrines, especially those qualifications made by the Supreme Court of the United States, which are not referred to and cannot be referred to in this Restatement. Something should go in, however—there should be a warning to look forward."

The cases from State courts cited by appellant will not be discussed in detail. Collectively it may be said that not one of them is concerned with such an exaction as Virginia's, applied in similar circumstances. In fact, we have been able to discover no reported decision, State or Federal (and counsel for appellant have cited none), other than *General Railway Signal Co.* v. *Virginia, supra,* and *Western Gas Construction Co.* v. *Virginia, supra,* dealing with such a charge. The only State decisions cited in the text passing on single charges are *Badger* v. *Crockett,* 70 Utah, 265, an entrance fee of 25 cents per $1,000 of authorized capital without a limit; *Chicago, etc., Railroad Co.* v. *Kansas,* 89 Mont. 1, an additional fee, not an entrance fee, imposed after the original fee had been paid, measured by authorized capital and without limit; *State* v. *Liggett & Myers Tobacco Co.,* 171

S. C. 511, a fee without limit based on authorized capital stock retroactively imposed on a corporation long doing business in South Carolina.

Appellant argues that this Court has never made any distinction between a fee imposed at the time of entrance, and taxes, both single and annual, exacted after entrance. The obvious answer to this argument is that only in the cases involving the Virginia fee has it ever been necessary to make the distinction and the decisions show that in those cases it was made. But the answer on fundamental principle is that the argument ignores the true *subject* of the tax and the purpose, operation and effect of the various statutes reviewed.

Virginia, therefore, respectfully submits that by this reasonable charge she neither attempts to nor does tax property beyond her jurisdiction or unlawfully burden interstate commerce, and that, therefore, appellant is deprived of no constitutional right.

B

A Foreign Corporation, Before Admission to a State, is not Entitled to the Equal Protection of the Law, but in any Event the Virginia Entrance Fee does not Arbitrarily Discriminate as Between Foreign Corporations, but is a Reasonable Requirement Bearing a Substantial Relation to the Right Granted.

Payment of the fee is a condition precedent to admission to the State. Until it is paid, a foreign corporation is not within the jurisdiction of Virginia and, therefore, not entitled to the equal protection of the laws. *Pembina Consol. Silver Min., etc., Co.* v. *Pennsylvania,* 125 U. S. 189; *Blake* v. *McClung,* 172 U. S. 261. Compare *Han-*

over Fire Insurance Co. v. *Harding,* 272 U. S. 494; *People* v. *Latrobe,* 279 U. S. 421; *Southern Railway Co.* v. *Greene,* 216 U. S. 400.

As admitted by appellant, this Court has never held that a foreign corporation, before admission to a State, is entitled to the equal protection of the laws. To so hold would be to deny the power of the State to absolutely exclude, by compelling the State to treat a foreign corporation before admission as if it had already been admitted. Assuming that it is settled that foreign corporations, once admitted, are entitled to equal protection with domestic corporations, the argument of appellant followed to its logical conclusion means that a State may not impose any condition precedent on a foreign corporation's admission that is not equally applicable to domestic corporations, a development of the doctrine of unconstitutional conditions never before advanced.

But even if appellant were entitled to the equal protection of the laws, it is clear that every foreign corporation in its class is treated alike under the Virginia statute. Admittedly Virginia may charge a foreign corporation a fee for the *right to do* local business, and it has never been denied that this fee may be demanded before entrance. Having this power, the State has chosen to exercise it. Manifestly the yardsticks available for the measure of such a tax are few. It, of course, cannot be measured by local business done or by property used in such business. Obviously, a single flat tax imposed alike on all corporations, regardless of size, would be infinitely more unreasonable and arbitrary. Virginia has, therefore, adopted the size of the corpora-

tion as the best available standard by which to value the right conferred. A large corporation, like appellant, with its oil wells and refineries, even though located outside the state, is thereby enabled to conduct a much larger volume of intrastate business in Virginia than a smaller company, and the privilege of conducting same is of more value to it than to a smaller company. It is submitted that under all the circumstances the measurement of the entrance fee by the size of the corporation being admitted is entirely reasonable.

Air-Way Electric Appliance Corp. v. *Day*, 266 U. S. 71, is relied upon by appellant. There the corporation had already obtained a certificate of admission to do business in Ohio, had paid the initial fee, and was, therefore, entitled to equal protection. It was then called upon to pay an annual fee for the privilege of continuing to exercise its franchise in Ohio, based upon the total authorized non-par shares represented by property owned and used and business transacted in the State. Only a small part of the authorized shares had been issued. Thus was involved an annual charge for the privilege of doing business, and it was held that authorized non-par shares held no relation to the privilege conferred and was not a reasonable measure of such a fee. Obviously an annual tax for the privilege of doing business imposed at the end of each year is susceptible of much more precise measurement and should be controlled by entirely different factors than a single entrance fee imposed for obtaining only the right to do business, and before the corporation has done any such business or acquired any property in the State.

This Court has not held that a charge against a foreign corporation must be measured by the value of the privilege for which it is imposed, but that some relation to such value is a reasonable requirement. *Air-Way Electric Appliance Corp.* v. *Day, supra; People* v. *Latrobe, supra.* Necessarily, from the nature of the charge, the Virginia fee must be to some extent arbitrarily fixed, but it is submitted that, for reasons heretofore stated, under all the circumstances it bears a substantial relation to the privilege conferred and is a reasonable requirement.

C

The Legislative Policy is Not in Issue

Appellant suggests that Virginia should adopt a different policy of taxing foreign corporations and adds an appendix illustrating methods which some other States have followed (Brief, pp. 70-72, 76-84). Whatever may be the merits of the Virginia system, it is sufficient to say that the United States Constitution does not require a State to adopt the best possible method of taxation. *People* v. *Latrobe, supra.* Appellant seems to contend that a foreign corporation should have the privilege of entering only a part of its capital stock. Under the privilege conferred upon entrance into Virginia, the corporation is not split up, but is admitted as a whole, and may, if it desires, employ all of its authorized capital stock in transacting an intrastate business.

As has been pointed out, Virginia is by its Constitution committed to the requirement of an entrance fee, and this statute has been in effect for more than thirty years. Doubtless more revenue could be obtained from

foreign corporations by the imposition of an additional annual franchise tax, but Virginia has demonstrated her lack of hostility to such corporations by allowing to remain unchanged this statute which has been sustained by her own courts and by this Court.

CONCLUSION

It is respectfully asserted that the entrance fee here challenged, in the light of all the facts and circumstances represents a valid exercise of the power of the State for a proper purpose, and that the decision of the court below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 1

THE ATLANTIC REFINING COMPANY,
Appellant

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA

Correction of Error in Original Brief of Commonwealth of Virginia

---

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LEWIS PRINTING COMPANY, RICHMOND, VA.

Supreme Court of the United States

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In the brief of the Commonwealth of Virginia there appears at pages 6 and 7 what was intended to be the section of the Tax Code of Virginia imposing an entrance fee on foreign corporations. This section is erroneously

stated to be section 205 and that section is copied. Section 205 in reality imposes a charter fee on certain domestic public service corporations. The section actually levying an entrance fee on foreign corporations is section 207 of the Tax Code (Acts of Assembly 1910, chap. 53, p. 77, sec. 38a at p. 79), and it reads as follows:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:
>
> "For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;
>
> "For a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof;
>
> "Over one million dollars, and not to exceed ten million dollars, one thousand dollars;
>
> "Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;
>
> "Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;
>
> "Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;
>
> "Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;
>
> "Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;
>
> "Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

Counsel for the Commonwealth of Virginia regret this error.

Respectfully submitted,

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Richmond, Virginia.
W. W. MARTIN,
Assistant Attorney General of Virginia,
Richmond, Virginia.

SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1937.

The Atlantic Refining Co. *vs.* Commonwealth of Virginia. } Appeal from the Supreme Court of Appeals of Virginia.

[November 8, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Atlantic Refining Company is a Pennsylvania corporation engaged in refining and selling gasoline and petroleum which it markets throughout the United States and in foreign countries. In 1929 the year's sales aggregated more than $153,000,000. Prior to 1930 the company had never applied for permission to do business in Virginia. It had not done any intrastate business there; and had no property or place of business within the State. It had done some interstate business, but had not paid, or been requested by the State to pay, either an entrance fee or taxes. In January 1930 the company applied to the State Corporation Commission for a certificate of authority to do intrastate business. Its net assets were then $132,196,275; its authorized capital $100,000,000; its issued capital $67,049,500. The Commission granted the certificate; but, as prescribed by Chapter 53, § 38a of the Act of Assembly of Virginia, 1910; Tax Code of Virginia (Michie, 1930) § 207, set forth in the margin,[1] exacted for the privilege $5,000 as an entrance fee. Payment was made under protest. Having duly claimed that by requiring it the statute violated the Federal Constitution, the company requested refund of the amount paid.

[1] "Section 207. Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;

For a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each thousand dollars or fraction thereof;

Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

Over ten million dollars, and not to exceed twenty million dollars, one thousand two hundred and fifty dollars;

Over twenty million dollars, and not to exceed thirty million dollars, one thousand five hundred dollars;

Over thirty million dollars, and not to exceed forty million dollars, one thousand seven hundred and fifty dollars;

The Commission refused to make the refund; the highest court of the State affirmed its order, 165 Va. 492; a[t] the case is here on the company's appeal.

Answering the company's statement under R[u]le 12, the Commonwealth opposed our taking jurisdiction. Its objection was that the appeal presented no substantial federal question, since, in 1918, the validity of the statute was challenged under similar circumstances and sustained by a unanimous Court in *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500; and, in 1928, was again sustained, by a Per Curiam opinion, in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597. The company asks us to overrule these decisions, contending that they are inconsistent with other and later cases. It asserts that in sustaining the Virginia statute this Court followed views expressed in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87; and that the doctrine of the *Baltic* case has since been repudiated, in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218 and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, 466. Consideration of the jurisdiction of this Court was postponed to the hearing on the merits.

By the statute foreign corporations are divided, for the purpose of fixing the amount of the entrance fee, into twelve classes. The fee for the lowest class—those whose authorized capital stock is $50,000 or less—is $30. The fee for the highest class—those whose authorized capital stock exceeds $90,000,000—is $5,000. The company does not object to the subject or the occasion of the exaction. Its objection is solely to the measure. Its claim is that the statute imposes an unconstitutional condition because it determines the amount of the fee by the amount of the company's authorized capital. The contention is that a fee so determined necessarily burdens

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Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

Over fifty million dollars, and not to exceed sixty million dollars, two thousand two hundred and fifty dollars;

Over sixty million dollars, and not to exceed seventy million dollars, two thousand five hundred dollars;

Over seventy million dollars, and not to exceed eighty million dollars, two thousand seven hundred and fifty dollars;

Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

Over ninety million dollars, five thousand dollars.

But foreign corporations without capital stock shall pay fifty dollars for such certificate of authority to do business within the State.

For the purpose of this Section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

interstate commerce, denies due process, and denies equal protection of the laws.

Unlike the cases in which the doctrine of unconstitutional conditions has been applied, the condition here questioned does not govern the corporation's conduct after admission. But it may be assumed that the rule declared in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, is applicable also to conditions to be performed wholly before admission; and that the $5,000 must be refunded if its exaction involved denial of any constitutional right. For we are of opinion that in refusing to grant the authority to carry on local business except upon payment of the $5,000 no constitutional right of the company was violated.

First. Virginia recognized the constitutional right of the company to carry on interstate business without paying an entrance fee. On the other hand, the company conceded that the Federal Constitution does not confer upon it the right to engage in intrastate commerce in Virginia unless it has secured the consent of the State. Compare *Hemphill* v. *Orloff*, 277 U. S. 537, 548. Whether the privilege shall be granted to a foreign corporation is a matter of state policy. Virginia might refuse to grant the privilege for any business, or might grant the privilege for some kinds of business and deny it to others.[2] It might grant the privilege to all corporations with small capital while denying the privilege to those whose capital or resources are large. It might grant the privilege without exacting compensation; or it could insist upon a substantial payment as a means of raising revenue.

As the entrance fee is not a tax, but compensation for a privilege applied for and granted, no reason appears why the State is not as free to charge $5,000 for the privilege as it would be to charge that amount for a franchise granted to a local utility, or for a parcel of land which it owned. If Virginia had the power to charge $5,000 for the privilege, the particular measure applied by the Legislature in arriving at that sum would seem to be legally immaterial; and the company is in a position like that of the taxpayer in *Castillo* v. *McConnico*, 168 U. S. 674, 680, of whom it was said: "His right is limited solely to the inquiry whether in the case which he presents

[2] Virginia does, in fact, refuse to foreign corporations the privilege of doing any intrastate public service business. Virginia Const. (1902) § 163. This prohibition was sustained in Railway Express Agency, Inc. *v.* Virginia, 282 U. S. 440, as applied to a foreign corporation wishing to carry on within the State an extensive interstate and local express business.

the effect of applying the statute is to deprive him of his property without due process of law." The validity even of a tax "can in no way be dependent upon the mode which the State may deem fit to adopt." *Home Insurance Co.* v. *New York*, 134 U. S. 594, 600. "The selected measure may appear to be simply a matter of convenience in computation . . . and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by any artificial rule . . . ." *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Botkin*, 240 U. S. 227, 233. Compare *Rae Consolidated Copper Co.* v. *United States*, 268 U. S. 373, 376; *New York* v. *Latrobe*, 279 U. S. 421, 427.

Second. Even if the Federal Constitution conferred upon every foreign corporation the right to enter any State and carry on there a local business upon paying a reasonable fee, there is nothing in the record to show that the $5,000 charged is more than reasonable compensation for the privilege granted. The payment required is a single, non-recurrent charge—a payment in advance for a privilege extending into the long future. No matter how large the company's local business may be, no matter how much, or how often, its issued capital may be increased, no additional entrance fee is payable. The value of such a privilege cannot be gauged by the sales expected in the year 1930.[3] They may increase rapidly from year to year. The corporation with $132,196,275 assets in 1930 may have more than double the amount a decade later. Nor is it unreasonable to base the fee upon the amount of the capital authorized at the time of the application, instead of charging a fee based upon the amount of the capital then issued, or upon the amount of assets then owned, and exacting later additional fees if, and when, more capital stock is issued or more assets are acquired. By fixing the fee in accordance with the capital authorized at the time of the application for admission, the State relieves itself of the necessity of keeping watch of changes in the future in these respects.

Third. It is contended that a fee measured solely by the amount of the corporation's authorized capital stock necessarily burdens interstate commerce. In support of that contention it

[3] Prior to 1930 two subsidiaries of the company did a local business in Virginia; and the company planned to take over all their property and business within the State. The aggregate of the sales of the company in interstate commerce in Virginia in 1929 and of sales by the subsidiaries in intrastate commerce amounted to $1,396,600. About two-thirds of this business was intrastate.

is said that the authorized capital stock represents property located in forty-seven States and several foreign countries used in both interstate and foreign commerce. But this is not true. Authorized capital has no necessary relation to the property actually owned or used by the corporation; furthermore, the fee for which it is the measure represents simply the privilege of doing a local business. Because the entrance fee does not represent either property or business being done, it is immaterial that in fixing its amount no apportionment is made between the property owned or the business done within the State and that owned or done elsewhere.

The entrance fee is obviously not a charge laid upon interstate commerce; nor a charge furtively directed against interstate commerce; nor a charge measured by such commerce. Its amount does not grow or shrink according to the volume of interstate commerce or the amount of the capital used in it. The size of the fee would be exactly the same if the company did no interstate commerce in Virginia or elsewhere. The entrance fee is comparable to the charter, or incorporation, fee of a domestic corporation—a fee commonly measured by the amount of the capital authorized.[4] It has never been doubted that such a charge to a domestic corporation whatever the amount is valid, although the company proposes to engage in interstate commerce and to acquire property also in other States. No reason is suggested why a different rule

[4] Forty-three states as well as the District of Columbia, Alaska, Hawaii, the Philippine Islands and Puerto Rico impose a domestic incorporation fee measured by the authorized amount of capital or number of shares. Alabama Code (1928) § 6969; Arkansas Stat. (Pope, 1937) § 2213; California Pol. Code (1933) § 409, as amended L. 1935, c. 295; Colorado Stat. Ann. (1935) c. 41, § 70; Connecticut Gen. Stat. (1930) § 3478; Delaware Rev. Code (1935) §§ 95, 2104; Florida Comp. Gen. Laws (1927) § 6582; Idaho Code (1932) § 65-809; Indiana Stat. Ann. (Burns, 1933) § 25-602; Iowa Code (1935) § 8349; Kansas Gen. Stat. (1935) § 17-221; Kentucky Stat. (1936) § 4225; Louisiana Gen. Stat. (1932) § 1147; Maine Rev. Stat. (1930) c. 56, § 10, as amended L. 1931, c. 240; Maryland Code (Supp. 1935) art. 81, § 133; Massachusetts Gen. Laws (1932) c. 156, § 53; Michigan Comp. Laws (1929) § 10138; Minnesota Stat. (Mason, Supp. 1936) § 7475; Mississippi Code (1930) § 4137; Missouri Const. art. X, § 21, Rev. Stat. (1929) § 4539; Montana Rev. Code (1935) § 145, as amended L. 1935, c. 50; Nebraska Comp. Stat. (1929) §33-103; Nevada Comp. Laws (1929) § 1676, as amended L. 1931, c. 224, §10; New Hampshire Pub. Laws (1926)) c. 225, § 91; New Jersey Comp. Stat. (Supp. 1925—1930) § 47-114; New Mexico Stat. (1929) § 32-223; New York Tax Law (McKinney, 1936) § 180, as amended L. 1937, c. 359, § 7; North Carolina Code (1935) § 1218, as amended L. 1937, c. 171; North Dakota Comp. Laws (1913, § 4509; Ohio Code (1936) § 176; Oklahoma Stat. (1931) § 3749; Oregon Code (1930) § 25-206; Pennsylvania Stat. Ann. (Purdon, 1929) tit. 72, § 1822; Rhode Island Gen. Laws (1923) c. 248, § 85, as amended L. 1925, c. 651, § 3; South Carolina Code (1932) § 7738; South

should be applied to the entrance fee charged this foreign corporation.

Fourth. It is contended that a statute which measures the entrance fee solely by the authorized capital deprives the corporation of its property without due process, because the amount is determined by reference to property beyond the taxing jurisdiction; and also that this charge is an arbitrary taking of property. As has been shown, the amount of the entrance fee is not measured by property, either within or without the jurisdiction; and it is not a tax upon property. It is payment for an opportunity granted. Nor is it a charge arbitrary in amount. The value of the privilege acquired is obviously dependent upon the financial resources of the corporation—not only upon the capital possessed at the time of its admission to do business, but also upon the capital which it will be in a position to secure later through its existing authority to issue additional stock. Obviously, the power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located. Compare *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412. Great power may be exerted by the company in Virginia although it has little property located there. And the value to it of the privilege to exert that power is not necessarily measured by the amount of the property located, or by the amount of the local business done, in Virginia. Moreover, it is immaterial whether the opportunity is availed of or not. The State grants a large privilege. It may demand a corresponding price.

Dakota Comp. Laws (1929) § 5334, as amended L. 1931, c. 225; Tennessee Code (Williams, 1934) § 1248.106; Texas Rev. Civ. Stat. (1925) art. 3914, as amended L. 1931, c. 120, § 1; Vermont Pub. Laws (1933) § 920; Virginia Tax Code (Michie, 1936) § 206; Washington Rev. Stat. (Remington, 1932) § 3836-1, as amended L. 1937, c. 70, § 1; Wisconsin Stat. (1935) § 180.02; Wyoming Rev. Stat. (1931) § 28-102; District of Columbia Code (1929) tit. 10, § 14; Alaska Comp. Laws (1933) § 1012; Hawaii Rev. Laws (1935) § 6753; Philippine Islands L. 1906, act 1459, § 8, as amended L. 1912, act 2135, § 1, L. 1915, act 2452, L. 1918, act 2728, § 3, L. 1928 act 3518, § 5; Puerto Rico L. 1911, act 30, §63a, as amended L. 1912, act 25.

In Utah the incorporation fee is measured by that proportion of the corporation's stock "represented or to be represented by its property owned and business done" in the state. Utah Rev. Stat. (1933) § 28-1-2. In Illinois an "initial license fee" is payable at the time the corporation files its first report of issuance of shares, and is measured by the value of the entire consideration received for its shares so issued. Illinois Rev. Stat. (B. A. Ed. 1937) c. 32, §§ 157.128—157.130. In Arizona, Georgia and West Virginia there is no charter or incorporation fee other than small fixed charges for such services as issuing and filing the certificate of incorporation. Arizona Rev. Code (1928) § 1459; Georgia Code (1933) §22-307; West Virginia Code (1937) § 5819.

Fifth. It is contended that the statute by measuring the entrance fee solely by the authorized capital is void because it operates arbitrarily and unequally between the appellant and other foreign corporations seeking the same privilege within the State. The contention is unfounded. Even if a corporation which has not yet been admitted to do business were in a position to complain that the State denies it equal protection, there is here no basis for a claim of discrimination. Every foreign corporation with an authorized capital exceeding ninety million dollars which seeks admission to do an intrastate business is, and has been since 1910, required to pay the same entrance fee. Nor is there any discrimination between foreign corporations and domestic of which the company may complain. While the charter fees of domestic corporations are smaller than the entrance fees of foreign corporations, Virginia levies upon foreign corporations, after admission, less in taxes than it does upon domestic corporations. A domestic corporation with an authorized capital of $100,000,000 is required to pay a charter fee of only $600; but it must pay each year a franchise tax of $8,850. A foreign corporation of that authorized capital is required to pay an entrance fee of $5,000, but pays no franchise tax whatever.

The difference in the powers of a State over entrance fees and taxes was pointed out in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, 510-511: "In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind."

Sixth. The position of the company in the case at bar differs radically from that of the foreign corporation involved in *Cudahy Pack-*

ing Co. v. *Hinkle, supra,* and from those in the other decisions of this Court on which appellant relies. In each of those cases the corporation had, before the exaction held unconstitutional, entered the State with its permission to do local business and pursuant to that permission had acquired property and made other expenditures. Their property and the local business were found to be so closely associated with this interstate business done there that the exaction burdened it. The exaction, although called in some of those cases a filing fee, was in each case strictly a tax; for it was imposed after the admittance of the corporation into the State.[5] In the case at bar the situation is different. In 1930, when the company applied for the permission to do local business, it had no property whatsoever within the State. It had never done any local business there. Its product had been marketed locally in Virginia by two other foreign corporations which had been duly admitted to do local business, and whose facilities the company had used in connection with its interstate business. The company wished to make a change. It wanted to acquire the property and business of the two corporations which were marketing its product and thereafter to carry on the local business itself. In order to do so it sought permission of the State to engage in local business. The State in no way attempted to impose an additional burden upon the company or otherwise to change the conditions under which it was operating. Virginia insisted merely that if the company wished to change the existing conditions, it should comply with the statute enacted fourteen years before the company began to do business there.

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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[5] This is true of Cudahy Packing Co. *v.* Hinkle, 278 U. S. 460; Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1; Pullman Co. *v.* Kansas, 216 U. S. 56; Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146; and also of Looney *v.* Crane Co., 245 U. S. 178, although there the admission had been under a Texas license, and the act challenged imposed a greatly increased filing fee applicable to the extension of the license. The exactions involved in International Paper Co. *v.* Massachusetts, 246 U. S. 135; Locomobile Co. *v.* Massachusetts, 246 U. S. 146; and Air-Way Electric Appliance Corp. *v.* Day, 266 U. S. 71, were annual franchise taxes applicable only after the corporation had been duly admitted. In Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147, and Alpha Portland Cement Co. *v.* Massachusetts, 268 U. S. 203, the foreign corporation was engaged exclusively in interstate business, so that the subject of the exaction was not taxable.